Indian Claims Commission

Roseau River Anishinabe First Nation

Report on: Medical Aid

102-02723/

Indian Claims
Commission

Commission
des revendications
des Indiens

March 15, 2001

Chief Edward Hayden
Roseau River Anishinabe First Nation

The Honourable Robert Nault
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

RE: Roseau River Anishinabe First Nation – Medical Aid Claim

On October 8, 1996, counsel for the Roseau River Anishinabe First Nation wrote the Indian Claims Commission requesting an inquiry on behalf of their client. The Commission began its work by convening a first planning conference on November 27, 1997, where the parties discussed the issues pertaining to this claim and the conduct of the inquiry.

After a series of planning conferences, the inquiry continued with a community session during which the Commissioners heard from elders regarding the First Nation's oral history. The inquiry concluded with oral submissions on March 25, 1999 in Winnipeg.

The review of the facts of this claim, together with our legal analysis, findings, and recommendations to the parties, is set out in the attached report.

Just before the release of this report, the Commission was deeply saddened by the sudden passing of Commissioner Carole Corcoran. It is to our great regret that she is no longer with us to see its release but this report represents her considered deliberations.

Commissioner Corcoran was a valuable contributor to the body of work produced by the Commission over the past decade as this report will attest.

FOR THE INDIAN CLAIMS COMMISSION

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CANADA

INDIAN CLAIMS COMMISSION

ROSEAU RIVER ANISHINABE FIRST NATION INQUIRY MEDICAL AID CLAIM

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February 2001

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PART I

INTRODUCTION

This claim by the Roseau River Anishinabe First Nation[1] originated during one of the most complex periods in Canadian history, when the newly created nation struggled to consolidate and expand upon the achievements of the former colonies of Canada West (previously Upper Canada, now Ontario), Canada East (formerly Lower Canada, now Quebec), New Brunswick, and Nova Scotia. Once Confederation had been confirmed in 1867, it was widely expected that combined nationhood would assist the former British North American colonies in achieving a series of shared goals, including the establishment of viable defensive forces in the face of the threat of United States expansionism, the maintenance and elimination of significant public debts accumulated by the participating provinces, and the shared desire to acquire Rupert's Land, the vast region west of the Great Lakes that had been granted to the Hudson's Bay Company in the 17th century.[2] More significantly for the purposes of this inquiry, the period also heralded a major turning point for prairie Indians, whose lives were forever changed by the disappearance of the buffalo, the appearance in epidemic proportions of life-threatening diseases such as smallpox and measles, and the arrival of ever-increasing numbers of settlers from eastern Canada and Europe. These events triggered the negotiation of the first of the so-called numbered treaties and the concomitant conversion of aboriginal hunters and trappers to a more sedentary life centred on reserve-based agriculture.

Shortly after Confederation, Rupert's Land was identified as an ideal location for population growth and economic expansion, and to that end Britain provided a loan to Canada to enable it to acquire the territory from the Hudson's Bay Company. An agreement was struck by which the company surrendered the land to Britain in November 1869, while retaining small land parcels immediately surrounding its trading posts, as well as one-twentieth of the fertile western prairie lands. The terms of the transaction provided that Britain would transfer the west to Canada once the latter became ready to assert effective control over the region.

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[1] Depending on the historical context, the Roseau River Anishinabe First Nation will be referred to in this report as "Roseau River," the "First Nation," or the "Band." At the time of Treaty 1, the First Nation was known as the Pembina Band and included at least two groups, one residing at what is now Roseau River Indian Reserve (IR) 2 at the mouth of the Roseau River, and the other residing some 10 miles upstream at what is now Roseau Rapids IR 2A. The reserves are located approximately 60 miles south of Winnipeg and less than 10 miles from the U.S. border. The Pembina Band became known as the Roseau River Band in 1887.

[2] R.D. Francis, R. Jones, and D.B. Smith, *Origins: Canadian History to Confederation*, 2nd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1992), 405.

This arrangement stirred apprehension and uncertainty among residents of the Red River area, including the French and English populations and former local officials of the Hudson's Bay Company, but particularly among the two most populous groups in this region – the Indians and the Métis. One of the greatest failings of the high-level negotiations to transfer the west to Canada lay in the fact that local inhabitants were not given the opportunity to participate. They feared that the transfer would be implemented without sufficient regard for their interests. This concern became heightened in August 1869, when Canada dispatched teams of surveyors to run surveys in township patterns, which conflicted with existing river lots established in the Red River settlements.

In October 1869, Canada sent out William McDougall to become the Lieutenant Governor of the new territory. A group of Métis under the leadership of Louis Riel barred McDougall's entry at the American border, refusing to recognize his authority because Canada had not yet assumed control of the area. With the Hudson's Bay Company having relinquished its authority over the territory, and the British having no presence there, McDougall was powerless. His efforts to assert his authority forcefully served only to unify the disparate Red River population against him. Riel, whose seizure of Fort Garry had originally been opposed by British residents, filled the political void with little opposition and established a provisional government on December 7, 1869. With this move, the Métis sought to compel the federal government, in the course of negotiating the terms of annexation with the rest of Canada, to acknowledge the rights of citizens in the newly acquired territory. The Métis were willing to allow their homeland to be annexed by Canada, but they were adamant that the process be achieved in harmony with their concerns. They were prepared to support their convictions with the threat of arms.

Although measures were soon under way to reconcile the interests of Canada and the provisional "authorities," Riel took the provocative step of having "rebel" Thomas Scott executed by firing squad after his conviction at trial. With the anger of Ontario Orangemen galvanized by this act, racial tensions erupted. A military expedition was sent west to establish discipline and eventually it gained control of the region, forcing Riel to flee. By April 1870, the brief tenure of the provisional government had run its course.

First Nations also manoeuvred to have Canada acknowledge their title to the lands in question. In May 1869, for example, as rumours swirled about the negotiations with the Hudson's Bay Company, the Portage Indians under Chief Yellow Quill, who "objected to the further settlement of their lands,"[3] forced a group of immigrants away from Rat Creek, west of present-day Winnipeg. In an effort to ameliorate this situation, the company authorized James McKay to negotiate an agreement with the Band. McKay, a prominent anglophone Métis businessman and politician fluent in several Indian languages, was able to conclude an agreement whereby the Band agreed to "give a lease of the land ... for the term of three years." In agreeing to this arrangement, the Band made it known that it was "fully expecting that some arrangements will be made with us before the expiration of the three years, about our lands."[4] Clearly, band members were adamant that Canada recognize their title to the land and provide compensation for its extinguishment.

Ultimately, this series of events led to the passing of the *Manitoba Act* on May 12, 1870, to create the province of Manitoba, followed by the proclamation of the legislation and the transfer of Manitoba and the remainder of the west to Canada two months later. British Columbia joined Confederation in 1871, followed by Prince Edward Island in 1873. By these broad strokes, the Canadian political and geographical landscape had been transformed in a remarkably few years.

With the Canadian desire to open the west came the recognition, in accordance with the conventional thinking of the time, that the vested interests of aboriginal residents would have to be extinguished to free up the land for settlement and development. The extinguishment of Indian title had been government policy since the issuance of the *Royal Proclamation* in 1763. Conflicts over land had already arisen in Manitoba by 1870, and the Indians pressed for treaties to clarify the positions of all concerned. For its part, the federal government realized that any resolution concluded with respect to grievances in Manitoba would require the cooperation of the aboriginal inhabitants. However, Canada and the new province, still seeking to organize and establish authority in the

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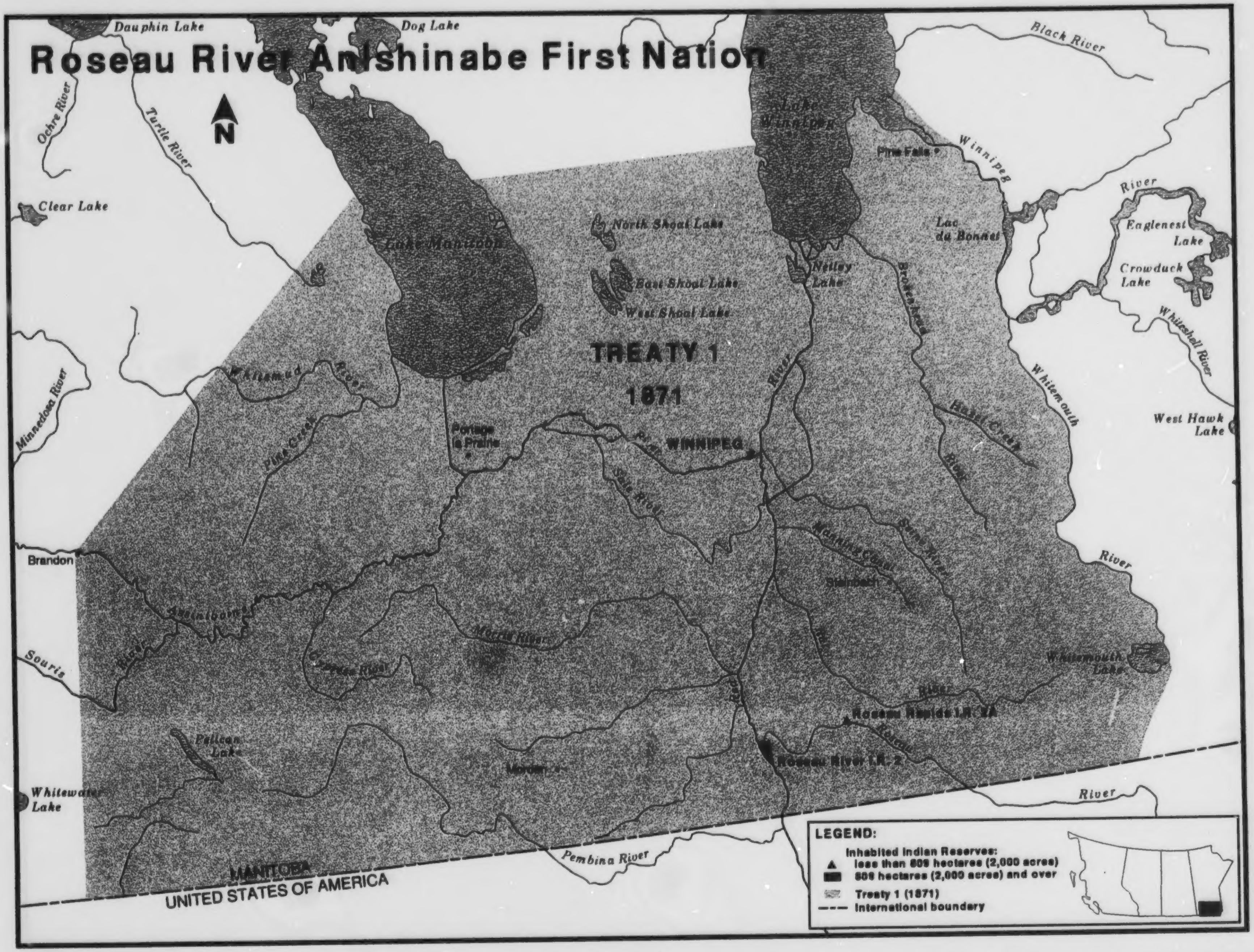
[3] W.L. Morton, ed., *Alexander Begg's Red River Journal and Other Papers Relative to the Red River Resistance of 1869–70* (Toronto: Champlain Society, 1956), 431, as cited in N. Ronaghan, "The Archibald Administration in Manitoba, 1870–1872," PhD dissertation, University of Manitoba, 1987, p. 665.

[4] *Globe* (Toronto), September 14, 1869, as cited in N. Ronaghan, "The Archibald Administration in Manitoba, 1870–1872," PhD dissertation, University of Manitoba, 1987, p. 689.

Roseau River Anishinabe First Nation


N
Dauphin Lake
Dog Lake
Black River
Ochre River
Turtle River
Clear Lake
Lake Manitoba
Lake Winnipeg
Pine Falls
Winnipeg
River
Lac du Bonnet
Eaglenest Lake
Crowduck Lake
Whiteshell River
West Hawk Lake
North Shoal Lake
East Shoal Lake
West Shoal Lake
Netley Lake
Brokenhead
TREATY 1
1871
River
Whitemouth
Hazel Creek
River
Minnedosa River
Whitemud
River
Pine Creek
Portage la Prairie
WINNIPEG
River
Sale River
Brandon
Assiniboine
Souris
Plum
Morris River
Boyne River
Manning Canal
Seine River
Steinbach
River
Whitemouth Lake
River
Roseau Rapids I.R. 2A
Roseau
Roseau River I.R. 2
Red
Pelican Lake
Morden
Whitewater Lake
Pembina River
River
MANITOBA
UNITED STATES OF AMERICA
LEGEND:
Inhabited Indian Reserves:
▲ less than 809 hectares (2,000 acres)
■ 809 hectares (2,000 acres) and over
▨ Treaty 1 (1871)
--- International boundary

aftermath of the Red River uprising, were not yet ready to deal. When they did come to the table in 1871, lengthy negotiations resulted in Treaties 1 and 2, which, like the succeeding numbered treaties, focused primarily on the extinguishment of aboriginal title in exchange for the Indians receiving, *among other things*, annual cash payments, or "annuities," and reserve lands.

A central issue in the present inquiry is whether medical aid was one of the "other things" to which Canada committed under Treaty 1.

THE COMMISSION'S INQUIRY PROCESS

Roseau River claims that medical aid was an unwritten, or "outside," treaty promise. In the First Nation's view, therefore, when Canada deducted medical aid payments from the First Nation's trust accounts between 1909 and 1934, this action amounted to a breach of the government's treaty obligations. The First Nation further asserts that these deductions were not authorized by the *Indian Act* or by the terms of the Band's surrender of a portion of its reserve in 1903. As Roseau River stated when it originally submitted its claim in a report by Roger Townshend to Indian Affairs' Office of Native Claims in September 1981:

> This paper presents a claim for compensation based on the management of band funds. Specifically, it disputes the propriety of medical care having been paid for with band funds for the period 1909 to 1934, and proposes appropriate compensation.
>
> This claim is based on free medical care having been one of the promises made at the negotiations leading up to Treaty Number One.[5]

After reviewing the claim and completing additional confirmation research, Director R.M. Connelly of the Specific Claims Branch informed Chief Carl Roberts on March 1, 1984, that the claim had been rejected:

> The Department of Justice has completed its review of all the materials prepared cooperatively by your band and this office. They are of the view that there was no undertaking made by the Crown to provide the Roseau River Band with free medical

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[5] Roger Townshend, "Roseau River Indian Band Claim for Compensation Arising from Management of Band Funds, Specifically, Band Funds Used to Pay for Medical Care" (Winnipeg: Treaty and Aboriginal Rights Research Centre of Manitoba, September 1981) (ICC Exhibit 1, p. 3).

> aid, pursuant to Treaty 1. Consequently, there is no outstanding lawful obligation to reimburse the Roseau River Band for medical expenses charged to the band's trust fund account. In reaching this conclusion, the Department of Justice also points out that the application of band funds to pay medical expenses was authorized by the *Indian Act* as amended from time to time.[6]

On October 8, 1996, Roseau River's legal counsel wrote to the Indian Claims Commission (the Commission) to request that it inquire into Canada's rejection of this claim.[7] After an initial planning conference, the inquiry continued with a staff visit to the First Nation on June 11, 1998, to take "willsays" from elders regarding the First Nation's oral history of Treaty 1 and promises of medical aid. On July 14, 1998, the Commissioners conducted a community session at Roseau River's Ginew School. The First Nation delivered written submissions to the Commission on February 26, 1999, and Canada responded on March 10, 1999. The Commission received oral submissions from the parties on March 25, 1999, in Winnipeg.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

MANDATE OF THE COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[8] This Policy, outlined in the Department's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[9] The term "lawful obligation" is described in *Outstanding Business* as follows:

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[6] R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, DIAND, to Chief Carl Roberts, Roseau River Indian Band, March 1, 1984 (ICC file 2106-03-03).

[7] Rhys Wm. Jones, Lofchick, Jones & Associates, to Indian Claims Commission, October 8, 1996 (ICC file 2106-03-03).

[8] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) *A breach of an obligation arising out of government administration of Indian funds or other assets.*
> iv) An illegal disposition of Indian land.[10]

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.[11]

The Commission has been asked to inquire into and report on whether the Roseau River Anishinabe First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

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[9] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

[10] *Outstanding Business*, 20; reprinted (1994) 1 ICCP 179. Emphasis added.

[11] *Outstanding Business*, 20; reprinted (1994) 1 ICCP 180.

PART II

HISTORICAL BACKGROUND

EVENTS PRECEDING TREATY 1

The Commission has already alluded to some of the events that formed the backdrop to the negotiation of Treaty 1 in 1871, and, in particular, the unsettled state of political affairs in the west. Meetings were held with various bands in 1870 to discuss Canada's intentions and to secure the support of these groups while the government took steps to address the demands made by the Métis concerning the transfer of Hudson's Bay Company territory to Canada. That fall, with the province of Manitoba just four months old, Lieutenant Governor Adams G. Archibald met with Henry Prince, the Chief of the St Peter's Band, to ask for his patience in dealing with the pressing questions of land tenure and treaties:

> I have been sent here as you are aware by the Governor General of the Dominion of Canada as the Representative of your Queen and I thus take the earliest opportunity of meeting you Prince and your people so that without further delay you may return to your hunting grounds and make provision for your families during the coming Winter. The Government of this Province has not as yet been fully established and it is impossible just as yet to make treaties but in the spring when matters are in order, I shall be most happy to meet all our Indian friends again.... When the proper time arrives for holding a council I will summon you to it through your Chief.... We must first proceed to enact laws for the protection of the Indian & the Whiteman alike.[12]

Negotiations for a treaty were accordingly postponed until the government had set its house in order.

By the following spring, the Indians felt compelled to take steps to prevent encroachments on their territory, and it became clear to Archibald that treating with the Indians could not be put off any longer:

> [A]s soon as the spring opened they became anxious about the Treaty. They have sent repeated messages enquiring when the Treaty was to come off, and appeared very much disappointed at the delay. They have interfered with emigrants, warning them not to come on the ground outside the Hudson's Bay Company's surveys, and lately

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[12] "Notes of Interview between the Lieut. Governor of Manitoba and Henry Prince (Miskookeenu), Chief of the Salteaux [sic] & [illegible] at St. Peters Parish School," September 13, 1870, Provincial Archives of Manitoba (PAM), MG 12 A1, RM 1-1, No. 22 (ICC Documents, pp. 10–11, 13).

TABLE 1
KEY PARTICIPANTS IN THE TREATY-MAKING AND SURRENDER PROCESSES

NAME	TITLE
Ay-ee-ta-pe-tung	Spokesman for the Portage Indians at Treaty 1 negotiations
Archibald, Adams G.	Lieutenant Governor of Manitoba and the North-West Territories, September 1870–October 1872
Assiniwinin	Selected by the Chiefs and elders of the Ojibway tribe and Pembina bands to commit to memory the proceedings and promises made during the Treaty 1 negotiations
Cochrane, Rev. Henry	Native pastor for Church of England Missionary Society Indian settlement, St Peter's Parish, 1859–64 and 1866–75; interpreter at Treaty 1 negotiations
Howe, Joseph	Secretary of State for the Provinces/Superintendent General of Indian Affairs, 1869–73
Ke-we-tay-ash (Flying Round)	Chief of the Roseau River Anishinabe in 1871; signed Treaty 1
McKay, James	Métis guide, interpreter, and prominent businessman; President of Executive Council and Speaker of the Manitoba Legislative Assembly, 1871–74; assisted Archibald and Simpson in the negotiation of Treaty 1
Laird, David	Minister of the Interior/Superintendent General of Indian Affairs, 1873–76; Lieutenant Governor of the North-West Territories, 1876–81; Indian Superintendent for the North-West Territories, 1876–79; Indian Commissioner, 1898–1909
Marlatt, S.R.	Inspector of Indian Agencies, 1897–1907
Morris, Alexander	Lieutenant Governor of Manitoba, 1872–76
Na-na-wa-nanaw (Centre of Bird's Tail)	Chief of Roseau Rapids Anishinabe in 1871; signed Treaty 1
Na-sha-ke-penais (Flying Down Bird)	Chief of Fort Garry Anishinabe in 1871; signed Treaty 1
Pedley, Frank	Deputy Superintendent General of Indian Affairs, 1902–13
Prince, David	Member of St Peter's Band; signed the "Prince affidavit," along with James Letter Sr, Henry Chief, Thomas Flett, William Bear, and Thomas Spence, December 30, 1872
Prince, Henry (Mis-koo-kenew or Red Eagle)	Son of Peguis; Chief of St Peter's Band in 1871; signed Treaty 1

NAME	TITLE
Provencher, J.A.N.	Indian Commissioner, February 1873–February 1876; Indian Superintendent for Manitoba, 1876–78
St John, Molyneux	Clerk of Manitoba Legislature, 1870; Secretary to the Indian Commissioner, July–August 1871; Assistant to the Indian Commissioner/Indian Agent, July 1872–May 1875
Schultz, John C.	Member of Parliament for Lisgar, Manitoba, 1871–82; Senator, 1882–88; Lieutenant Governor of Manitoba, 1888–95
Simpson, Wemyss M.	Hudson's Bay Company employee, 1841–69; Member of Parliament for Algoma, 1869–71; Indian Commissioner, April 1871–February 1873
Spragge, William	Deputy Superintendent General of Indian Affairs, 1862–74
Wa-ko-wush (Whippoorwhil)	Chief of Pembina and Joe Creek Anishinabe in 1871; signed Treaty 1
Wa-sus-koo-koon	Spokesman at the Treaty 1 negotiations for the three chiefs representing bands between Pembina and Fort Garry
Yellow Quill (Oo-za-we-kwun)	Chief of Portage Indians in 1871; signed Treaty 1

> they have posted up a written notice on the door of the church at Portage La Prairie, warning parties not to intrude on their lands until a Treaty should be made.[13]

Archibald further noted the "anxiety and uneasiness among the Indians, with a feeling of danger on the part of emigrants seeking lands and ready to commence work, but subjected to enforced idleness by the danger of entering against the will of the Indians."[14]

Joseph Howe, Canada's Secretary of State for the Provinces, responded by appointing Wemyss M. Simpson as Indian Commissioner to arrange "with the Bands inhabiting the Tract of Country between Thunder Bay and the Stone Fort, for the cession (subject to certain reserves such as they should select) of the lands occupied by them."[15] Besides being a Member of Parliament for the Algoma (Sault Ste Marie) district at the time, Simpson benefited from 28 years as a trader and employee with the Hudson's Bay Company and seems to have been conversant in Ojibway. His experience and linguistic skills prompted the government to appoint him as interpreter for the Red River expeditionary force sent west during the summer of 1870 to depose Louis Riel and establish Canadian jurisdiction within the former Hudson's Bay Company lands. In theory, Simpson's combined experience made him uniquely qualified for the role of treaty commissioner.

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[13] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 19, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 10–11 (ICC Exhibit 8, tab 2).

[14] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 19, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 10–11 (ICC Exhibit 8, tab 2).

Simpson was concurrently engaged with Simon J. Dawson and Robert Pether to act as commissioners in seeking the surrender of Indian lands in what is now northwestern Ontario between Lake Superior and the Manitoba border. The instructions issued by Howe to these three men reveal a great deal about the approach Canada expected to employ in treating with the Indians generally:

> One object which the Government have in view in seeking the surrender of this tract of country is to make the route now being opened from Thunder Bay to Manitoba secure for the passage of Emigrants, and of the people of the Dominion generally. They also desire to throw open to settlement any portion of the land included in this area which may be susceptible of improvement and profitable occupation....
>
> The ... maximum amount which you are authorized to give, is twelve dollars per annum for a family of five, with a discretionary power to add small sums in addition when the families exceed that number. In fixing this amount, you must not lose sight of the fact that it cannot fail to have an important bearing on the arrangements to be made subsequently with the tribes further West.
>
> Another point to which I wish to call your attention is the policy of restricting as much as possible the amount to be paid in money. It has been represented to the Government that money is but little used by the Band with whom you will negotiate and that provisions and clothing are much more highly prized. There is a danger too that, should money become plentiful among those people, traders will bring spirits into the settlement, and demoralize and destroy the Indians.
>
> One part of your duty, and by no means the least important, will be to select desirable reserves for the use of the Indians themselves, with a view to the gradual

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[15] Joseph Howe, Secretary of State for the Provinces, to Governor General in Council, April 17, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 4 (ICC Exhibit 8, tab 2).

> introduction of those agencies which in Canada have operated so beneficially in promoting settlement and civilization among the Indians.[16]

The three Commissioners were unable to conclude a treaty in Ontario in 1871. The Indians of that region wanted time to consider the proposal placed before them, but they were forced to disperse in any event by the onset of "a disease very like scarlatina" that claimed 11 lives, many of them children, and left "many more in a precarious state."[17] However, heartened by the reception they had received, the Commissioners agreed to return the following year, and Simpson journeyed on to Manitoba.

Shortly after his arrival at Fort Garry on July 16, 1871, Simpson met with Lieutenant Governor Archibald and Métis businessman James McKay, who had been retained as an interpreter, to discuss how to proceed in light of Simpson's experience in Ontario and Archibald's knowledge of the Indians in Manitoba. As Archibald reported:

> We were all of opinion that it would be desirable to procure the extinction of the Indian title, not only to the lands included within the Province, but also to so much of the timber grounds east and north of the Province, as were required for immediate entry and use, and also of a large tract of cultivable ground, west of the Portage, which, having very few Indian inhabitants, might be conceded with very little additional cost.[18]

Although Simpson and Archibald would have preferred to deal with all the Indians in one set of negotiations, they believed doing so would lead to delays that would prevent newly arrived immigrants from getting on the land in time to build homes and make preparations for the coming winter. Moreover, they were concerned with having to feed the entire aboriginal population for the entire length of the proceedings, as well as having to disperse the large assembly once negotiations were complete.[19] For these reasons, Simpson issued two separate proclamations to invite the Indians to commence treaty negotiations, one to the Indians of Manitoba to meet at the Stone Fort on the Red River on July 25,[20] and the other requesting the Indians residing north and west of the province to assemble on August 17 at the Hudson's Bay Company post on Lake Manitoba.[21]

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[16] Joseph Howe, Secretary of State for the Provinces, to W.M. Simpson, S.J. Dawson, and Robert Pether, Commissioners, May 6, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 6–7 (ICC Exhibit 8, tab 2).

[17] Wemyss M. Simpson, S.J. Dawson, and Robert Pether, Commissioners, to Joseph Howe, Secretary of State for the Provinces, July 11, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 9–10 (ICC Exhibit 8, tab 2).

[18] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 19, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 11 (ICC Exhibit 8, tab 2).

Archibald was keenly aware that the negotiations in Manitoba would "probably shape the arrangements we shall have to make with the Indians between the Red River and the Rocky Mountains."[22] However, he expressed some misgivings that it might not be possible or even appropriate to attempt to extinguish Indian title in Manitoba on the same basis authorized by Ottawa for aboriginal lands in northwest Ontario:

> I doubt if it will be found practicable to make arrangements upon so favorable a basis as that prescribed by his Excellency the Governor General, as the maximum to be allowed, in case of a treaty with the Lake Indians.
>
> Nor indeed would it be right, if we look to what we received, to measure the benefits we derive from coming into possession of the magnificent territory we are appropriating here, by what would be fair to allow for the rocks and swamps and muskegs of the Lake country east of this Province.[23]

Nevertheless, Archibald was determined to ensure that all appropriate preparations were in place to expedite the negotiations. To that end he assembled the necessary supplies of food to sustain the

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[19] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 19, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 10–11 (ICC Exhibit 8, tab 2).

[20] Proclamation issued by Wemyss Simpson, Indian Commissioner, July 18, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 12 (ICC Exhibit 8, tab 2).

[21] Proclamation issued by Wemyss Simpson, Indian Commissioner, July 18, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 12 (ICC Exhibit 8, tab 2).

[22] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 22, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 12–13 (ICC Exhibit 8, tab 2).

[23] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 22, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 13 (ICC Exhibit 8, tab 2).

Indians in attendance, and he arranged for Major A.G. Irvine of the North-West Mounted Police to have his men on hand because "the presence, even of a few troops, will have a good tendency."[24] Simpson, meanwhile, issued another proclamation, this one banning the sale of liquor until the negotiations were completed, "to protect, not only our said Indian subjects, but also the population of this Province from the terrible evils and mischief which would ensue, if intoxicating liquors were allowed to be used by the Indians on the occasion aforesaid.'[25]

Still, although Archibald recognized the precedent that the Manitoba negotiations were likely to establish for Canada's future negotiations with First Nations, it seems unlikely that Canada and the Indians truly comprehended each other's intentions. Neither the government nor Archibald had a comprehensive understanding of the concerns of aboriginal peoples within the newly acquired territory, such as their fear of losing traditional lands or their desire to be compensated for past loyalty to the Queen. Instead, as we have seen, the government intended to rely on established policies and practices that had been convenient when they had been applied to different circumstances in eastern Canada.

As for the Indians, it is apparent that they, too, misconstrued Canada's objectives. From their many decades of experience as traders in commerce with the Hudson's Bay Company, First Nations people had come to expect treatment as equals to the white man, and they believed that this perspective should guide all discussions regarding the proposed treaty.[26] As Simpson's fellow Commissioner in Ontario, Simon J. Dawson, warned:

> Any one who, in negotiating with these Indians, should suppose he had mere children to deal with, would find himself mistaken.... [T]hey are shrewd and sufficiently awake to their own interests, and, if the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make one

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[24] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 22, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 13 (ICC Exhibit 8, tab 2).

[25] Proclamation issued by Wemyss Simpson, Indian Commissioner, July 23, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 13 (ICC Exhibit 8, tab 2).

[26] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 323 (ICC Exhibit 8, tab 3).

> themselves, until it is fully discussed and deliberated upon in Council by all the Chiefs.
>
> At these gatherings it is necessary to observe extreme caution in what is said, as, though they have no means of writing, there are always those present who are charged to keep every word in mind. As an instance of the manner in which the records are in this way kept, without writing, I may mention that, on one occasion at Fort Frances, the principal Chief of the tribe commenced an oration, by repeating, almost verbatim, what I had said to him two years previously.[27]

Circumstances had changed, however, with the decline of the fur trade, commencing in the mid-1800s, and First Nations did not comprehend how the substitution of Canada for the Hudson's Bay Company would alter their relationship with the governing authorities. Nor did they appreciate the changes that increased immigration would have on their homelands. It is not surprising, therefore, that neither party may have been entirely prepared for the negotiations giving rise to Treaty 1.

TREATY NEGOTIATIONS

When Indian Commissioner Simpson's appointed day – July 25, 1871 – arrived to commence negotiations, he found that he was unable to proceed because many of the Indians were not yet present. The meetings were postponed, first until the next day and then until July 27, pending the arrival of the remaining bands. Once the meetings were under way, Lieutenant Governor Archibald outlined the basis of what Canada was prepared to offer the bands in return for the extinguishment of their title to the lands in question:

> Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

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[27] S.J. Dawson to unidentified recipient, undated, Canada, Parliament, *Sessional Papers*, 1867–68, No. 81, p. 28; and see Canada, Parliament, *Sessional Papers*, 1869, No. 42, pp. 20–21, as cited in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 323–24 (ICC Exhibit 8, tab 3); Terrance Nelson (Musk-Ko-Dah-Be-Shik-eese), "Anishinabe Aki (Earth/Land): Sovereignty and Sovereign Immunity in Treaty #1 – Examining the Conditions of Treaty in Our Terms," January 1997, p. 11 (ICC Exhibit 7, section 2); and D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, pp. 15–16 (ICC Exhibit 7, section 2).

> But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this....
>
> Your Great Mother, therefore, will lay aside for you "Lots" of land to be used by you and your children forever. She will not allow the white man to intrude upon these Lots. She will make rules to keep them for you, so that, as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.
>
> These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers....
>
> When you have made your Treaty you will still be free to hunt over much of the land included in the Treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate....
>
> You will look to the Commissioner to fulfil everything he agrees to do, and the Queen will look to the Chiefs you name to us, to see that you keep your parts of the agreement.[28]

Simpson followed with his own comments aimed at convincing the Indians to be reasonable in their requests for land:

> I want you to listen to the words spoken by the great chief, the Governor, who has given you the very best advice which can possibly be given. The Government of Her Majesty is perfectly willing and anxious to provide for the welfare of her Indian subjects, as you have heard; but you must not imagine for a moment that in a country such as this, with immense cultivable acres, and with white people thronging into it,

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[28] "Memorandum of an Address to the Indians by the Lieut.-Governor of Manitoba," July 27, 1871, attached to a letter from Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 29, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 16–17 (ICC Documents, pp. 16–17; ICC Exhibit 8, tab 2).

> it is the intention of the Government to allow immense reserves to the different bands of Indians. The Government will give to the Indians, reserves amply sufficient. The different bands will get such quantities of land as will be sufficient for their use in adopting the habits of the white man, should they choose to do so.[29]

In the course of this speech, Simpson requested that the Indians choose representatives from within their own ranks to participate in the negotiations that were to begin in earnest the following day.

When the discussions resumed on July 28, the Indians requested more information regarding the proposed treaty terms. As reported in the *Manitoban* newspaper, Simpson explained:

> Where ever I have been connected with the treaties alluded to, he said, the arrangement was that each family should get a yearly payment of so much per head, men women and children, which payment goes on in perpetuity, and is not, as in the United States, for only a certain number of years. The agent comes annually with the goods or money and payment is made to every individual Indian – not to the chiefs alone. If the Indians do not come the money is put by for them, orgiven to any one duly authorised to draw their payment. The agent paying the annuity has a roll drawn out, showing exactly how many Indians are to be paid and giving their names, which list is made up from a census and prevents any cheating. With regard to the reserve, the Indians themselves are always consulted as to where they will want it – whether all in one place, or in several....
>
> His Excellency [Archibald] explained that reserves did not mean hunting grounds, but merely portions of land set aside to form a farm for each family. A large portion of the country would remain as much a hunting ground as ever after the Treaty closed.[30]

By Saturday, July 29, it had become apparent that, notwithstanding the groundwork laid by Archibald and Simpson, the Indians perceived the purpose of reserves as something markedly different from what had been envisioned by the Crown. Through James McKay and his fellow interpreter, the Reverend Henry Cochrane, Simpson and Archibald admonished the spokesmen for the various bands, "showing them that their demands were so preposterous that, if granted, they would have scarcely anything to cede, and urging them to curtail their demands."

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[29] Wemyss Simpson, Indian Commissioner, July 27, 1871, as quoted in the *Manitoban*, August 5, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 340 (ICC Exhibit 8, tab 3).

[30] Wemyss Simpson, Indian Commissioner, July 28, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 345 (ICC Exhibit 8, tab 3).

> His Excellency [Archibald] further reminded them that the terms offered them were better than those under which white men came to settle and made themselves comfortable homes. In the United States reserves were sometimes given and sometimes withheld, while the annuities generally terminated after 20 years. The annuities offered the Indians in this negotiation would last as long as the sun shines. Each family of five, under these provisions, gets 160 acres and $12 a year, and if there are more than five in the family, they get in proportion to the amount named.[31]

At the close of the day, Simpson asked the Indians to consider this proposal and to be prepared to reply to it when negotiations resumed. He left the table "inclined to think that the Indians will accept these terms."[32]

However, on July 31, 1871, the fifth day of negotiations, the parties reached an impasse. Some of the Indian negotiators threatened to leave, believing that the treaty terms proposed by Simpson would not benefit them and would be insufficient to sustain future generations of their people. More particularly, Wa-sus-koo-koon expressed the concern that Indian farmers would be unable to raise the capital necessary to establish themselves. In response to a suggestion by Ay-ee-ta-pe-tung, Simpson indicated his willingness to increase the annuity from $12 per family of five to $3 per person, but the parties were still unable to conclude an agreement. Simpson ended the day's discussions by warning that he would "break up the negotiations unless they came to a close next day."[33]

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[31] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, July 29, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 348–49 (ICC Exhibit 8, tab 3).

[32] Wemyss Simpson, Indian Commissioner, to Joseph Howe, Secretary of State for the Provinces, July 30, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 18 (ICC Documents, p. 24; ICC Exhibit 8, tab 2).

[33] Wemyss Simpson, Indian Commissioner, July 31, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 352–53 (ICC Exhibit 8, tab 3).

In fact, the meeting did not reconvene until August 2, "the interval being rendered necessary, partly through bad weather, and the absence of the Lieut.-Governor – Tuesday being his day for attending business at the Upper Fort and partly in order to give the Indians full time to decide finally."[34] The focus of conversation changed considerably, with additional emphasis being placed by the Indians on requests for agricultural assistance and clothing. In reply, Archibald promised

> that the Queen was willing to help the Indians in every way, and that besides giving them land and annuities, she would give them a school and a schoolmaster for each reserve, and for those who desired to cultivate the soil ploughs and harrows would be provided on the reserves.[35]

Perhaps encouraged by this concession, the bands' representatives, led by Henry Prince, tendered additional requests, including housing, furnishings, hunting equipment, buggies for the chiefs and councillors, various domestic utensils, and freedom from taxation.[36] As historian D.J. Hall has noted:

> The Governor and Commissioner had not spoken of how the Indian might be assisted in the future, probably because that was not part of the treaty as they conceived it. They were confined by precedent, which meant chiefly the Robinson Huron and Superior treaties of 1850, which provided for small annuities, an initial gratuity, reserves, and hunting and fishing rights in return for the general surrender of lands to the Crown. Agricultural and educational assistance were later provided as a matter of policy but not as a treaty right.
>
> This promise of assistance by the Governor altered the whole mood of the negotiations. Whether or not Prince's sally had been a deliberate change of strategy by the Indians, they now saw an alternative way to secure their future if the reserves and annuities were not to be increased. At this point, however, orderly discussion clearly broke down.... Although the Commissioner responded in good humour, suggesting that if all these demands were met, he himself would be better off as an

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[34] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, August 2, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 353 (ICC Exhibit 8, tab 3).

[35] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, August 2, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 354 (ICC Exhibit 8, tab 3).

[36] Wa-sus-koo-koon, August 2, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 355 (ICC Exhibit 8, tab 3).

> Indian, clearly he was not prepared to concede much. When the Portage Indians left the proceedings, and others were considering doing so, it finally dawned on the officials that no treaty would be possible without some last ditch compromises.[37]

With negotiations obviously at a pivotal juncture, McKay assumed a central role in the proceedings. The *Manitoban* reported that, besides the Portage Band, "other Indians were also thinking of leaving, but Hon. Mr. McKay asked them to stay over one more night and meet the Commissioner again next day, promising that in the interval he (McKay) would try and bring the Commissioner and Indians closer together."[38] Archibald himself recognized the risks facing the government should the negotiations fail, and he later lauded McKay's efforts to achieve a compromise:

> On Wednesday, we met and spent the whole day with no apparent progress; on the contrary, at the close of the meeting, notwithstanding all that could be said, we had reason to fear that our efforts to negotiate a Treaty would prove abortive. The Indians of the Portage, on our Western Frontier, were the least civilized of the assemblage. Their principal spokesman was a Savage, besmeared all over with white clay, and naked, except a cloth around his loins. This band of Indians it was most important to propitiate; but, at the close of the meeting, they announced their determination to withdraw from the Council and go home. They rose and left the meeting, declaring that they would go back, stake off their reserves as they themselves had named it, and would continue to hold it.
>
> This was rather a critical point of affairs. Their words were peaceful enough, but it was easy to see what would be the end.
>
> It was obvious therefore that we must yield something, or we must be prepared to people the country, with hostile Indians hovering on our settlements, and an Indian war in the back ground.
>
> We thereupon invited them to think over our propositions during one more night, and if there was any chance of coming to terms to meet us in the morning.
>
> During the night, active negotiations were carried on with the Chiefs, and it was ascertained that, by a pecuniary present to cover all claims for damages by reason of the intrusion of the white man up to this date, and by some little provision for the

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[37] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 327–28 (ICC Exhibit 8, tab 3).

[38] *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 355 (ICC Exhibit 8, tab 3).

> Chiefs and a few Braves, not to be repeated, there was a prospect of the parties closing with us.
>
> We acceded to the demands, and the whole matter was finally arranged at a meeting on Thursday. I had taken care to have the Treaty written out and all ready to be signed, whenever the Blanks for the matters in dispute could be filled in, and at four o'clock in the afternoon the Treaty was signed to the entire satisfaction, not of the Indians only, but of the whole inhabitants of the Province.
>
> A large number of Immigrants, who had made selections near the Western Border, and who had been warned by the Indians not to intrudeon their soil till the Treaty was signed, were in attendance and returned to their homes delighted to be able to put an end to the idleness of themselves and their families and teams, which their dread of the effects of incurring the resentment of the Savages had imposed upon them.
>
> There is a general feeling of relief here at the happy close of a matter which at one point looked sufficiently threatening.
>
> In the success we have had in bringing this matter to a close, we are largely, very largely indebted to the unceasing and judicious efforts of the Honorable James McKay, who deserves to be mentioned in terms of the highest praise.
>
> I brought to your notice, some time ago, the importance of securing his services in the negotiating of a Treaty. He enjoys to a large extent the confidence of the Indians. He speaks their language with great force and fluency, and his addresses were most judicious and forcible while his personal acquaintance with the Chiefs gave great force to his advice and persuasions....
>
> I may add that Mr. Simpson's appreciation of Mr. McKay's services is entirely in accordance with my own.[39]

This account makes it clear that Archibald and Simpson believed it was necessary to "yield something" to reach an agreement and avoid future hostilities, and that they eventually "acceded to the demands" of the Indians. A contemporaneous account of the proceedings attributed to David Prince of the St Peter's Band refers to a number of terms, including an initial present or "gratuity" of $3, subsequent annual payments of $3 per person, reserve land of 160 acres for each family of five, clothing, farm animals, horses and buggies, protection from the sale of liquor, and exemption from taxation on the reserve. However, it also suggests in closing that not all the agreed terms were immediately reduced to writing:

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[39] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, August 5, 1871, National Archives of Canada (hereafter NA), RG 10, vol. 363 (Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, pp. 124–35, 138).

> The treaty book was opened one hour to any man to speak, nobody spoke. When the hour expires the great man get up again and said, the hour is up now am going to close our treaty books, the book is closed and sealed no man under the sun will open the book except our great Mother Queen. If any man brings new thing on top of this book he will sound like a [illegible] talking away far off and we are enclosing this agreement and *we are not putting down here small articles which we are now promising to you all, we shall have them [on] one side of the paper we just put down the big articles what we are promising you*. Our great Mother and all the white people with the Governor Archibald and Indian Commissioner Simpson and all the witnesses signs this agreement which is now made.[40]

In this same vein, Prince, together with fellow St Peter's members James Letter Sr, Henry Chief, Thomas Flett, William Bear, and Thomas Spence, later swore an affidavit (referred to in this inquiry as the "Prince affidavit") in which he asserted "[t]hat Governor Archibald and Commissioner Simpson did both promise to the Indians that the things demanded should be given, but said that we will not put all those things in the Treaty paper, but we will promise to make a separate paper which will do as well, and you will be sure of the things."[41]

Unfortunately, the record does not provide further particulars regarding the course of discussions during the evening of August 2, 1871, and for this reason it is impossible to identify precisely how the gap between the parties was bridged. Nevertheless, it is apparent from the *Manitoban*'s coverage of the brief, seemingly affable, final meeting on August 3, 1871, that the serious bargaining had been completed the previous night:

> All the Indians met His Excellency and the Commissioner to-day in better humor. The Commissioner said he understood they were disposed to sign the treaty, and in consideration of their doing so, he would, in addition to what was stated in the treaty, give them a present, but for this year only, of $3 per head, a pair of oxen for each reserve, and buggies for each of the chiefs.

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[40] David Prince, St Peter's Band, "Subjects of Treaty at the Stone Fort," undated (ICC Documents, pp. 25–26). Emphasis added.

[41] Affidavit of David Prince, James Letter Sr, Henry Chief, Thomas Flett, William Bear, and Thomas Spence, December 30, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 9 (ICC Documents, p. 92).

> This gave general satisfaction, and the treaty was soon signed, sealed and delivered, with all due formality. The ceremony was witnessed by a large crowd of spectators.[42]

It did not take long, however, for serious differences of opinion on the content of Treaty 1 to emerge.

THE CROWN'S RECORD OF TREATY 1

The written text of Treaty 1 sheds little additional light on the promises made on August 2, 1871, but comparisons with the statements in the *Manitoban* and by David Prince confirm that some of the negotiated terms did not find their way into the final document. Treaty 1 states:

> Whereas all the Indians inhabiting the said country have pursuant to an appointment made by the said Commissioner, been convened at a meeting at the Stone Fort, otherwise called Lower Fort Garry, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and to the said Indians on the other, and whereas the said Indians have been notified and informed by Her Majesty's said Commissioner that it is the desire of Her Majesty to open up to settlement and immigration a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrangements with them so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive year by year from Her Majesty's bounty and benevolence....
>
> The Chippewa and Swampy Cree Tribes of Indians and all other the Indians [sic] inhabiting the district hereinafter described and defined do hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the following limits, that is to say: – [legal description of the ceded lands]. To have and to hold the same to Her said Majesty the Queen and Her successors for ever; and Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians the following tracts of land, that is to say: ... for the use of the Indians of whom Na-sha-ke-penais, Na-na-wa-nanaw, Ke-we-tayash and Wa-ko-wush are the Chiefs, so much land on the Roseau River as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, beginning from the mouth of the river; ... it being understood, however, that if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her

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[42] *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 356 (ICC Exhibit 8, tab 3).

> Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians.
>
> And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians parties to this treaty, She hereby, through Her Commissioner, makes them a present of three dollars for each Indian man, woman and child belonging to the bands here represented.
>
> And further, Her Majesty agrees to maintain a school on each reserve hereby made whenever the Indians of the reserve should desire it.
>
> Within the boundary of Indian reserves, until otherwise enacted by the proper legislative authority, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve Her Majesty's Indian subjects inhabiting the reserves or living elsewhere from the evil influence of the use of intoxicating liquors shall be strictly enforced.
>
> Her Majesty's Commissioner shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the district above described, distributing them in families, and shall in every year ensuing the date hereof, at some period during the month of July in each year, to be duly notified to the Indians and at or near their respective reserves, pay to each Indian family of five persons the sum of fifteen dollars Canadian currency, or in like proportion for a larger or smaller family, such payment to be made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine or traps, at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash.
>
> And the undersigned Chiefs do hereby bind and pledge themselves and their people strictly to observe this treaty and to maintain perpetual peace between themselves and Her Majesty's white subjects, and not to interfere with the property or in any way molest the persons of Her Majesty's white or other subjects.[43]

Signed by Na-sha-ke-penais, Na-na-wa-nanaw, Ke-we-tay-ash, and Wa-ko-wush on behalf of the Indians at Roseau River, Treaty 1 in its *written* form contains no other significant terms for the purposes of this inquiry.

Once the treaty was completed and executed, Archibald forwarded it to Howe in Ottawa on August 5, 1871, where it was ratified "on the conditions expressed in the said Treaty"by Order in Council dated September 12, 1871.[44]

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[43] *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer and Controller of Stationery, 1957), 3–5.

[44] "Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 12th September 1871," PAM, MG 12 B1, item 466 (Exhibit 8, tab 6).

Based on the foregoing record, it is unlikely that officials in Ottawa who did not attend the actual negotiations were aware that the government's commitments may have gone further than "the conditions expressed in the said Treaty." That document in its written form did not include any obligations beyond the stipulated reserves, annuities, payment of an initial present of $3 per person, schools for those bands desiring them, and protection against the sale of alcohol to Indians on or off the reserves. Although modern-day commentator D.N. Sprague has referred to "[t]he discrepancies between the verbal understandings and the written text of the treaty [as] dangerous oversights if not deliberate deceptions,"[45] historian D.J. Hall is more circumspect:

> The treaty itself marked only a slight change from the general scheme of the Huron and Superior Treaties. It surrendered to the Crown an area slightly larger than the original province of Manitoba. In return the government gave each Indian a present of $3; agreed to maintain a school on each reserve; promised to prohibit the sale of liquor on the reserves; undertook to pay an annuity of $15 per family of five, pro-rated for larger or smaller families, and payable in goods useful to the Indians or in cash; and agreed to provide reserves on the basis of 160 acres ofland per family of five, again pro-rated for larger or smaller families. Hunting privileges which had been promised by Lieutenant Governor Archibald in his opening speech, and which had been included in the treaties of 1850, were for some reason omitted. The provisions regarding liquor and education were new to treaties; although both were certainly within the administrative intentions of the government, their inclusion in the treaty seems curious since neither appears to have been the subject of extensive Indian pleading, if the newspaper account is any indication. No provision was made for the agricultural implements, animals, clothing, hunting equipment, or other concessions demanded on the last day of negotiations.[46]

THE "OUTSIDE PROMISES"

Although Treaty 1, as approved by Order in Council, makes no mention of medical aid, it is obvious that there was considerable confusion at the time of the treaty negotiations over what had actually been promised. Officially, Canada took the position that all its obligations could be found within the four corners of the treaty, although some of its representatives seemed to acknowledge that the written document did not list all the promises that had been made. By way of contrast, almost immediately following the execution of Treaty 1, the Indian signatories began to press for the fulfilment of alleged unwritten commitments that came to be known as the "outside promises."

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[45] D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, p. 15 (ICC Exhibit 7, section 2).

[46] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 328 (ICC Exhibit 8, tab 3).

Roseau River's interpretation of the oral obligations encompassed by Treaty 1 has been passed down in the form of oral history by succeeding generations of band members. In anticipation of this inquiry, elder Oliver Nelson, a former Chief of the First Nation, prepared two reports in 1998 describing the methods used by his forefathers to preserve for future generations the promises made during the meetings to discuss Treaty 1.[47] In the report forming the basis for his oral submission to the Commission in this inquiry, he wrote:

> Ni Misomis Assiniwinin as a young boy, was selected by the Chieftains and Elders of Babagwanoskozeebee and the Pembina Bands to commit to his memory the proceedings and promises made at the treaty negotiations. Our people could not write in those days and this practice was used by the Ojibways to record significant events in our tribal history. Mr. and Madam Commissioners I can assure that the cession of our traditional tribal lands to the British Crown was and always will be the most significant event in the tribal history of the Babagwanoskozeebee and the Pembina Anishinabe....
>
> Assiniwinin undertook this responsibility very seriously and with great fervor, as can be attested to by the Elders here in Roseau River, who can remember Ni Misomis Assiniwinin.... Assiniwinin did not speak or understand English. All the promises that he committed to his memory were those that were spoken and translated into Ojibway.[48]

After itemizing in considerable detail the promises made by the Indians to the Crown in 1871, Nelson listed the considerations recounted by Assiniwinin as having been promised in return by the Crown:

- the Indians would be permitted to retain the lands they occupied before treaty, with those lands to be surveyed and titles to be issued to the respective owners;

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[47] Oliver J. Nelson, "Our Grandfathers' Trust," January 1998 (ICC Exhibit 6); Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998 (ICC Exhibit 5).

[48] Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998, pp. 3, 5 (ICC Exhibit 5).

- the Indians would be treated equally with other bands in Canada;
- the treaty would last "as long as the sun shines, the rivers flow, and the grass grows," with the Crown pledging to protect the Indians' lands;
- each Chief, together with two councillors and two headmen for each band, would receive distinctive clothing, a horse and a buggy, with the Chief also receiving a flag and a medal;
- the Crown would enact laws to prohibit the sale of alcohol to Indians either on- or off-reserve;
- for each band, the Crown would set apart and survey 32 acres of reserve land for each person in the band over and above the lands already owned outright by individual Indians within the band, with more land to be made available further west for children born into the band;
- to enable the Indians to farm the land reserved to them, the Crown would provide farm implements, seed, a farm instructor, farm animals, a blacksmith, a carpenter, and the use of hay lands and timber lands;
- on settling down to commence farming, the Indians would be provided with domestic items such as cloth, sewing needles, thread, soap, and wash boards;
- the Indians would be permitted to hunt, trap, fish, and gather on their own lands and on lands not yet taken up by white farmers;
- to help Indian hunters feed their families, the Crown would provide guns, lead, powder, snare wire, traps, and fishline;
- when the hunt failed, the Crown would supply rations, including salt pork, flour, baking powder, lard, beans, salt, tea, and sugar;
- when the Indians requested it, each reserve would be provided with a school and a teacher;
- there would be no taxation on reserve lands; and,
- most significant for the purposes of this inquiry:

> When the Indians got sick the Queen promised she would provide*medicines for the sick*. Assiniwinin said the medicine men were upset about this because they said that the Indian's medicines were better that [sic] the whiteman's. Because, many white men were also seeing the Indian medicine men. The missionaries, the Indians from Sageeing and the St. Peters reserves wanted the medicines for the sick, so medicines for the sick was promised. The other

> Indians did not like this promise but accepted this promise in their tents, for the other Indians.[49]

Nelson continued by describing those Crown undertakings that came to be known as the "outside promises":

> So, from the point of view of the Roseau River Anishinabe First Nation and the other Treaty One First Nations, *any agreements made and agreed to in the negotiations of the Treaty of 1871 that were outside the draft treaty document, were the outside promises*. It was also the understanding of the Roseau River Chieftains, Wakowosh, Keywaytayash, Nanawanan and Nashakeypenais that the Commissioner would return and put the outside promises on another piece of paper, later, but soon....
>
> The draft treaty document did not provide for the new promises secured by the Treaty #1 First Nation negotiators. What were these outside promises?
>
> Among the Treaty #1 First Nations, the outside promises each First Nation has listed have been consistently the same and these were; ...
>
> x. *Medical attendance for the sick*....
>
> x[v]i. *Medical attendance* was promised and was accepted by our Chieftains reluctantly, because it would benefit our brothers on the St. Peters and Sakeging Reserves, at the time of the Treaty.[50]

It will be noted that, at this point in his report, Nelson referred to "medical attendance" rather than the term "medicines for the sick" used earlier in the report and in his prior report. Additional outside promises enumerated by Nelson at this point, but not previously listed in his report, were exemption from conscription; restriction of police from entering the reserve except in cases of murder, rape, or grand larceny; and, because Roseau River had three Chiefs rather than one, provision of extra clothing, medals, flags, equipment, and animals.

From these reports it can be seen that, in the summer of 1871, Assiniwinin and the other members of the Band had a considerably different view of the Crown's obligations under Treaty 1 than would be suggested by the bare words of the treaty document. It is not surprising that this should be so, given the recollections of Indian Agent Molyneux St John regarding the negotiations:

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[49] Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998, p. 13 (ICC Exhibit 5). Emphasis added. In cataloguing the Crown's treaty promises in an earlier report, Nelson had covered much the same ground, again stating that the Crown was obliged to provide "medicines for the sick": Oliver J. Nelson, "Our Grandfathers' Trust," January 1998, pp. 6–7 (ICC Exhibit 6).

[50] Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998, pp. 18–21 (ICC Exhibit 5). Emphasis added.

> When Treaty No. 1 was in process of negotiation, the spokesmen of the several Indian bands enumerated the gifts and benevolences which they required from Her Majesty's representatives in return for the surrender of the Indian country. Some of these were accorded, some refused; but, in the natural desire to conclude the Treaty, His Excellency, the then Lieutenant Governor and Mr. Commissioner Simpson, assumed, as it afterwards proved too hastily, that their distinctions and decisions were understood and accepted by the Indians.
>
> Amongst the several speakers on the part of the Commission was a clergyman [Rev. Henry Cochrane] who had been for many years in pastoral charge of the St. Peter's Reserve, and this gentleman supplemented the articles enumerated by the Indians by mentioning others, which the Lieutenant Governor, he said, had authorized him to say they were to receive. Though immediately interrupted by Mr. Commissioner Simpson, the words had been spoken; and, at that juncture of affairs, it would have been difficult and probably inexpedient to entirely disallow them.*So the Treaty was signed, the Commissioner meaning one thing, the Indians another. The proceedings were over but a short time before it became evident that there was some misunderstanding*, and with the view of setting the matter at rest, as far as regarded one side, His Excellency the then Lieutenant Governor, asked Mr. Commissioner Simpson, the Hon. James McKay and myself, as the persons knowing best the circumstances and details of the matter, to join with him in signing a list of articles [that has become known as the "memorandum of outside promises"] which we severally and collectively understood to be the things promised to the Indians but not mentioned in the Treaty. Some little discussion took place about this, but it was eventually signed, and, I believe, forwarded to Ottawa with the Treaty, in October, 1871.
>
> *This list expressed our understanding of the matter, but it by no means covered the understanding or expectations of the Indians*; and, from that time to the present, we have not visited any band, parties to that Treaty, without the untrustworthy nature of the Commissioner's and Governor's promises being thrown in our teeth....
>
> There is no difference of sentiment amongst them on this point; however remote they may be from one another, their demands and assertions are alike. In every case the cry has been the same, and there is not a shadow of a doubt that when they left the Grand Council at the Stone Fort, they were firmly impressed with the idea that the demands which they had made had been, with few exceptions, granted by the Queen' s representatives.
>
> I am not aware whether or not Mr. Archibald was a joint Commissioner with Mr. Simpson, but he was the central figure at the Council table, and the Indians attached as much weight to his utterances as to those of Mr. Commissioner Simpson.

> In after times they constantly visited him on the subject of the Treaty. It is necessary to know this to understand some of the conflicting accounts that are given by the Indians themselves. For instance, the Pembina band base their expectations of a complete settlement of the matter in 1871, on their understanding of a conversation with Mr. Archibald. When we visited them in the Fall of that year they asserted that they had been told by the Lieutenant Governor to go back to their Reserve (Roseau River), and that when the Commissioner visited them to pay them he would satisfy them as to the articles they asked for. Mr. Simpson made them repeat the assertion, and took it down in writing, signed by the Rev. Mr. Cochrane, himself an Indian, who acted as interpreter, for he denied having given any authority for such a promise. The Indians, however, thought that what the Lieutenant Governor had said was as binding as the word of the Commissioners, and so they became sulky and unmanageable....
>
> It is but common honesty to say that ... the things which were promised, and those which were refused, mentioned as they were by three apparent authorities and spoken of in no regular communication, were so mixed up that it is little wonder if even the four persons most likely to know the exact state of the case, could hardly agree in the precise definition, when that was attempted to be made [in the "memorandum of outside promises"], within a month after the Treaty; and not at all surprising that the Indians believe their demands were complied with at the time, and that we are now trying to shuffle out of our obligations.
>
> It is not necessary to give all these things at once; I certainly would not recommend it, but I should be in a position to tell the Indians exactly what they will have, in addition to what they have received, and when they will have it.[51]

Although he made no mention of St John's presence, Archibald similarly referred to a meeting in which he, Simpson, and McKay convened to formalize the outside promises: "Mr. Simpson has a memo signed by him and attested by myself and Mr. McKay, containing all the stipulations made with the Indians, that were not formally embodied in the Treaty. The Indians expect these promises to be rigidly kept, and it will be most unsafe to disappoint them."[52]

From the foregoing evidence, it appears that the list or memorandum cited by St John and Archibald was prepared no later than October 1871 in response to immediate concerns that a difference of opinion existed with regard to the promises actually made during the treaty negotiations. The record in this inquiry includes an undated "Memorandum of things outside of the Treaty which were promised at the Treaty at the Lower Fort" signed by Simpson, Archibald, McKay, and St John. The Commission concludes that this memorandum of outside promises was the instrument referred to by St John and Archibald, and it promised the following items:

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[51] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 11–12 (ICC Documents, pp. 102–3). Emphasis added.

[52] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 17, 1872, PAM, MG 12 B1, Despatch Book 3, No. 26 (ICC Exhibit 8, tab 7).

> For each Chief who signed the Treaty, a dress distinguishing him as Chief.
>
> For braves and for councillors of each Chief a dress; it being supposed that the braves and councillors will be two for each Chief.
>
> For each Chief, except Yellow Quill, a buggy.
>
> For the braves and councillors of each Chief, except Yellow Quill, a buggy.
>
> In lieu of a yoke of oxen for each reserve, a bull for each, and a cow for each Chief; a boar for each reserve and a sow for each Chief, and a male and female of each kind of animal raised by farmers, these when the Indians are prepared to receive them.
>
> A plough and a harrow for each settler cultivating the ground.
>
> These animals and their issue to be Government property, but to be allowed for the use of the Indians, under the superintendence and control of the Indian Commissioner.
>
> The buggies to be the property of the Indians to whom they are given.
>
> The above contains an inventory of the terms concluded with the Indians.[53]

Interestingly, when Simpson finally attended to submitting his own report on the treaty negotiations on November 3, 1871, he made little or no mention of the memorandum of outside promises, although in closing he advised Howe that "[a]mongst the papers accompanying this report is a requisition for dresses, buggies, medals, &c., as promised to the Indians, which I trust may receive early consideration, so that contracts may be given out in time to enable all of the articles named being distributed early in the coming season."[54] Whether this "requisition" was the document signed by Simpson, Archibald, McKay, and St John is unclear, but Simpson's report nevertheless echoed the terms of the memorandum of outside promises:

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[53] "Memorandum of things outside of the Treaty which were promised at the Treaty at the Lower Fort, signed the third day of August, A.D. 1871," in *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer and Controller of Stationery, 1957), 5–6.

[54] Wemyss M. Simpson, Indian Commissioner, to Joseph Howe, Secretary of State for the Provinces, November 3, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 32 (ICC Exhibit 8, tab 2).

> It was not until the 3rd of August, or nine days after the first meeting, that the basis of arrangement was arrived at, upon which is founded the Treaty of that date. Then, and by means of mutual concessions, the following terms were agreed upon. For the cession of the country described in the Treaty referred to, and comprising the Province of Manitoba, and certain country in the North-East thereof, every Indian was to receive a sum of three dollars a year in perpetuity, and a Reserve was to be set apart for each Band, of sufficient size to allow one hundred and sixty acres to each family of five persons, or in like proportion as the family might be greater or less than five. As each Indian settled down upon his share of the Reserve, and commenced the cultivation of his land, he was to receive a plough and harrow. Each chief was to receive a cow and a male and female of the smaller kinds of animals bred upon a farm. There was to be a bull for the general use of each Reserve. In addition to this, each Chief was to receive a dress, a flag and a medal, as marks of distinction, and each Chief with the exception of Bozawequare [Yellow Quill], the Chief of the Portage Band, was to receive a Buggy, or light spring waggon. Two councillors and two braves of each Band, were to receive a dress, somewhat inferior to that provided for the Chiefs, and the braves and councillors of the Portage Band excepted, were to receive a buggy. Every Indian was to receive a gratuity of three dollars, which, though given as a payment for good behaviour was to be understood to cover all dimensions for the past.
>
> On this basis, the Treaty was signed by myself and the several Chiefs, on behalf of themselves and their respective Bands, on the 3rd of August, 1871, and on the following day the payment commenced.[55]

Simpson's report provides indisputable confirmation that the written document referred to as Treaty 1 did not embody all the promises made by the Crown's representatives to the assembled bands on August 2 and 3, 1871. Moreover, since Simpson did not submit his report to Ottawa until *after* the treaty had been ratified by Order in Council, Canada apparently entered into a binding treaty without a thorough understanding of its contents. As Hall has remarked, officials and politicians in Ottawa believed that the treaty document alone defined government obligations, in terms "more generous than they had first intended"; accordingly, "they took a narrowly literal, hard-line approach to its administration when faced with Indian protests about broken promises."[56]

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[55] Wemyss M. Simpson, Indian Commissioner, to Joseph Howe, Secretary of State for the Provinces, November 3, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, pp. 28–29 (ICC Documents, pp. 63–64; ICC Exhibit 8, tab 2).

[56] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 328–29 (ICC Exhibit 8, tab 3).

CONFUSION OVER THE "OUTSIDE PROMISES"

Those protests were not long in coming. In the succeeding months, Canada was forced to address both the Indian complaints and its own uncertainty regarding its outstanding treaty obligations.

Complaints Regarding Unfulfilled Treaty Terms

As Indian Agent Molyneux St John recounted, disagreements over the substance of Treaty 1 arose almost immediately after its execution and they appear to have been largely responsible for the preparation of the memorandum of outside promises by October 1871. Similarly, in a February 10, 1872, report to Lieutenant Governor Archibald, James McKay remarked that he was constantly "being waited upon by Indians, claiming that the provisions of the Treaties should be carried out."[57] After completing the treaty negotiations, Indian Commissioner Simpson had left the area, and, as McKay noted, his absence made it difficult to deal with the Indians, who refused to believe that Archibald and McKay, as fellow members of Simpson's treaty party, did not have the same powers as the Indian Commissioner to fulfill the treaty's terms. In the face of the Indians' demands to be supplied with the "utensils, stock and seeds" claimed to have been promised under the treaty, McKay asked Archibald to "obtain the necessary permission from the Indian Department to give these provisions to them, and at the same time find out when the Indian Commissioner will be prepared to carry out the conditions of the Treaties."[58]

Two days later, on February 12, 1872, Archibald forwarded McKay's letter to the Secretary of State for the Provinces, Joseph Howe, commenting that he, too, had received "a deputation of Indians from Fort Alexander" requesting that the treaty provisions be fulfilled. Archibald shared McKay's dismay at Simpson's absence, adding that "[i]t would be a mere mockery in reply to their request, for explanations or aid, to say, they may apply to a commissioner, distant a thousand miles from here." Archibald suggested that Howe consider appointing someone to represent Simpson in Manitoba, observing that, otherwise, the former "easy access" the Indians had enjoyed to "the representative of the governing power" under the Hudson's Bay Company would be lost. In that event, Archibald warned, Canada would sacrifice its "friendly relations" with the Indians and forgo the benefits won during the treaty negotiations.[59]

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[57] James McKay to Adams G. Archibald, Lieutenant Governor, Province of Manitoba, February 10, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 3 (ICC Documents, p. 66).

[58] James McKay to Adams G. Archibald, Lieutenant Governor, Province of Manitoba, February 10, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 3 (ICC Documents, p. 66).

Like Treaty Commissioner Simon J. Dawson three years before, Archibald had come to appreciate the ability of the Indians to memorize the details of their negotiations:

> It is impossible to be too particular in carrying out the terms of the arrangements made with these people. They recollect with astonishing accuracy every stipulation made at the treaty, and if we expect our relations with them, to be of the kind, which it is desirable to maintain, we must fulfil our obligations with scrupulous fidelity.[60]

Since the Indian recollection of the outside promises did not conform with the position taken by the government, Indian dissatisfaction festered.

In the days and months that followed, Archibald's complaints to Howe became more strident in their open criticism of Simpson's failure to assume responsibility. On February 17, 1872, Archibald wrote:

> It is in vain for me to disclaim to these poor sons of the soil any responsibility for, or power to deal with Indian affairs. They are not politicians enough to distinguish between the representative of Her Majesty in one capacity and Her representative in another. They say they made the Treaty with the Queen, and they feel they have a right to look to me, as Her Representative, to see that the stipulations contained in the Treaties are kept. They say that I was present and took part in the negociations [sic]. They consider a reference to a Commissioner wholly inaccessible to them as really a refusal to fulfil the Treaty.
>
> What can I do under these circumstances? To refuse interviews would be to involve serious danger. To grant them, involves serious trouble and embarrassment. If I were free, after hearing the Indians, to act upon my own judgment, I should consider the trouble a matter of small moment, but to be obliged to listen to all they have to say, without power to deal with their complaints and talking to them at the

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[59] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 12, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 1–2 (ICC Documents, pp. 67–68).

[60] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 12, 1872, Canada, Parliament, *Sessional Papers*, 1873, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 1 (ICC Documents, p. 67).

> risk of contravening the policy of the Commissioner or the Gov[ernmen]t, is exceedingly disagreeable. It is a position in which I think I ought not to be placed....
>
> Of course I assume the Commissioner is preparing to discharge the obligations he contracted; but I do not know that he is – and I cannot assure the Indians that he is – while the spring is now at hand and there is not a moment to lose, if the promises are to be fulfilled.
>
> May I therefore ask you as the head of the Department to see that there should be somebody here, if Mr. Simpson is unable to come himself, who may, under the instructions of Mr. Simpson, deal with the Indians and explain to them what is doing [sic] and what they may count upon.
>
> It will be a matter of profound regret, if by neglect or indifference, we should forfeit the advantages of the Treaties and pave the way for a condition of things such as has arisen in the United States, much of which is due to indifference to & neglect of the Indians and to failure to fulfil strictly the obligations incurred in the Treaties made with them.[61]

Six days later, on February 23, 1872, having met with the Indians of Roseau River, Archibald wrote again, this time lamenting the Crown's failure to protect the Indians' reserves by undertaking the census promised in the treaty. Because a band's population determined the acreage of reserve land the band would receive, the lack of a census, in Archibald's words, made it "impossible to say with accuracy how far the [Roseau River] reserve extends," thereby exposing potential but unsurveyed reserve lands to plunder by non-aboriginals intent on removing timber for construction, fencing, and heating purposes.[62] When band members asked whether Archibald could provide them with the seed and farming implements promised in the treaty so they might start farming that spring, the Lieutenant Governor could only disclaim his own power to act while assuring them that Simpson, as Indian Commissioner, would fulfill the treaty promises. However, Archibald privately conveyed his concerns to Howe:

> I trust Mr. Simpson is not forgetting what he has before him. There is work enough here to keep a man of business steadily employed the year round, and Mr. Simpson is mistaken if he imagines that his absence prevents these people from making continual application about matters which interest them, or has [any] other

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[61] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 17, 1872, PAM, MG 12 B1, Despatch Book 3, No. 26 (ICC Exhibit 8, tab 7).

[62] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 23, 1872, PAM, MG 12 A1, R. M3-1, No. 35 (ICC Documents, p. 71).

> effect upon them than to shift them over to me or to Mr. McKay, work which he should do himself.[63]

On March 1, 1872, Archibald sought to ameliorate the troubling problem of unauthorized logging by issuing a proclamation forbidding the non-aboriginal population from cutting wood on reserve lands. At the same time, the proclamation prohibited Indians from harvesting timber outside the reserves, selling wood from their reserves to traders, or interfering with cutting outside reserve lands.[64] On April 6, 1872, Archibald forwarded a copy of the proclamation to Howe with a suggestion that, "as the faith of the Crown is pledged ... to the preservation of the Reserves for the use of the Indians," the federal government should afford the same protection to the reserves contemplated by Treaties 1 and 2 as to Indian lands elsewhere in Canada.[65] Nevertheless, on July 6, 1872, Archibald felt compelled to write yet again:

> When the Treaty of 3rd August last was made, the Indians were promised that a census of their different tribes should be taken with as little delay as possible, and that immediately afterwards the Reserves should be laid off, allotting to each soul thirty-two acres. A year, or nearly a year has elapsed and not a step has been taken towards ascertaining the number of Indians or laying off the Reserve. Meanwhile, at Roseau, the Reserve is robbed by whites, under color of an authority from an under officer of the Land Department, licensing them to cut anywhere on Dominion lands.
>
> The wood and timber, which formed a principal object of the Indians in their choice of a Reserve, have been carried off, notwithstanding the solemnly plighted faith of the Crown. This of course is known to the body of Indians all over the Province. Is it any wonder if it creates suspicion and fear or that the Indians, seeing nothing done to carry out the terms of the Treaty, should come to the conclusion to take the matter into their own hands?
>
> This is not a state of things that ought to continue....
>
> I feel a delicacy in interfering with matters outside my jurisdiction, but I cannot allow a feeling of that kind to prevent me doing what I can to put out sparks which, if neglected, might produce a serious conflagration. It is quite time those questions should be settled. Instructions should be given to have the Indian census

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[63] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 23, 1872, PAM, MG 12 A1, R. M3-1, No. 35 (ICC Documents, p. 72).

[64] Proclamation issued by Adams G. Archibald, Lieutenant Governor, Province of Manitoba, March 1, 1872 (ICC Exhibit 8, tab 8).

[65] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, April 6, 1872, PAM, MG 12 B1, Despatch Book 3, No. 55 (ICC Exhibit 8, tab 9).

> taken and the reserves laid off, with the least possible delay, so as to avoid the very serious complications which may arise if the work is not done.[66]

In his own defence, Simpson, in a letter dated August 2, 1872, to the Deputy Superintendent of Indian Affairs, William Spragge, professed surprise at Archibald's attacks on his administration of Indian affairs in Manitoba:

> I am unaware upon what authority Lieutenant Governor Archibald grounds his belief that no step had been taken to obtain a census of the Indians; but I may inform you that he is altogether wrong in his supposition. Those means promising most success were adopted last autumn, and I have a fairly accurate list of every band included in the Treaty, with the exception of one. Steps were taken to ascertain the number of Indians included in this band, but, up to the present time, I have not been able to obtain any trustworthy account of them. Probably at their payment, which takes place in about a week's time, I may be more successful.
>
> I am at a loss to understand Lieutenant Governor Archibald's expression that nothing has been done to carry out the terms of the Treaty, because I do not know what stipulations contained in the Treaty have been omitted, saving the definition of their Reserves.
>
> No definite time was spoken of for this survey, and I am unable to control the action of other federal officers who may adopt courses of which I disapprove. In a former letter Lieutenant Governor Archibald referred to the delay in furnishing the Indians with ploughs, harrows, &c. These things, however, were promised to be given to them only when they adopted the habits of white men and settled on their respective portions of their band's reserve. No Indian has yet applied to me for agricultural implements.
>
> With regard to the surveys, you will be aware that the Government have only lately been able to deal with the pressing demands of the white population of the Province. The half breed grant, although given long prior to that to the Indians, has been unavoidably postponed, and I had neither power nor instructions to ask the Superintendent of Surveys to discontinue the work laid out for him in order to define the limits of the Indian Reserve.[67]

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[66] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, July 6, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 3–4 (ICC Documents, pp. 82–83).

[67] Wemyss M. Simpson, Indian Commissioner, to W. Spragge, Deputy Superintendent of Indian Affairs, August 2, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 4–5 (ICC Documents, pp. 85–86).

Notwithstanding Simpson's protests that the complaints were ill-founded or beyond his control, his tenure as Indian Commissioner would prove to be short-lived. J.A.N. Provencher was appointed within a year to replace him.

The Pembina Bands Claim Medical Aid

In early September 1872, Indian Agent St John received a deputation from the "Pembina bands," including the Indians of Roseau River and Roseau Rapids, who presented him with a series of demands that, in their view, arose from the treaty negotiations. St John prepared a list of these demands and his responses to them, which he forwarded to Deputy Superintendent Spragge in a later report. It is particularly notable that, in item 9 of this list, the question of medical aid made its first appearance in the Crown's written record:

> 1. *Demand* – Ploughs and harrows. *Reply* – Perhaps more may be given when the Government are satisfied that those already given are used as intended.
> 2. *Demand* – A farmer. *Reply* – Some one will be employed to show them how to plough. (Memo.: told Atkinson to devote one week to this end in the spring.[)]
> 3. *D.* – A school master. *R.* – Will be sent when reserve is ready for him.
> 4. *D.* – Dresses for children. *R.* – Cannot say anything at present; by and by when children are at school, perhaps Government may allow me to do something.
> 5. *D.* – Copy of Treaty. *R.* – Shall be sent.
> 6. *D.* – Wood cut on Reserve last spring. *R.* – Will see Lieutenant Governor about it.
> 7. *D.* – Pigs, sheep, hens. *R.* – Pigs – yes. Sheep, no, because of dogs. Hens – yes, when I see where they are to keep them.
> 8. *D.* – Another yoke of oxen. *R.* – Only one promised, can do all the work they want at present.
> 9. *D. – Sick men. R. – Must take care of their own sick.*
> 10. *D.* – Houses. *R.* – Never promised.
> 11. *D.* – Store at River Marais. *R.* – No; never promised; useless.
> 12. *D.* – Hay for oxen. *R.* – Must cut their own hay.
> 13. *D.* – Locations for thirty families. *R.* – Shall be attended to.
> 14. *D.* – Using wool of sheep. *R.* – Nonsense.
> 15. *D.* – Yoke for oxen. *R.* – Yes. Will try and get them one.
> 16. *D.* – Keweelayash's brother-in-law being moved from American Band. *R.* – Will write to Government.

17. *D.* – Reaper. *R.* – Not necessary for those places.
18. *D.* – Surveyor. *R.* – To be sent as soon as Commissioner returns.[68]

St John appeared to have some sympathy for the Indians' position – indeed, as we have seen, he frankly acknowledged the Crown's inability to keep track of the obligations it had assumed during the treaty negotiations – but he believed that not all the claims amounted to treaty promises or should be accepted by the government. Referring to the foregoing list of demands and replies, he later commented in a February 24, 1873, letter to Spragge:

> You will observe in this that there are several matters not spoken of in the Treaty or mentioned in the outside promises. It would be a long and tedious story to show the expressions which led to such and such a demand, and to explain the why and wherefore of each misunderstanding. It has been palpable from the first that the present unsatisfactory state of the relationships was inevitable, and Mr. Commissioner Simpson, though always seeking to tide over any difficulty in the hopes that time would exercise its usual influence in such cases, has always expressed his regret at having allowed the signing of the first Treaty to be rushed as it was, when as subsequent events has [sic] shown it was so necessary to have a perfect understanding. The full demands of the Indians cannot of course be complied with, but there is nevertheless a certain paradox in asking a wild Indian, who has hitherto gained his livelihood by hunting and trapping, to settle down on a reservation and cultivate the land without, at the same time, offering him some means of making his living. As they say themselves: "We cannot tear down trees and build huts with our teeth, we cannot break the Prairie with our hands, nor reap the harvest when we have grown it with our knives." The Indian can of course be dealt with on the basis [of] "$3 a head and continue hunting and fishing till you die or are civilized off West" – or he can be induced to settle on his reserve and add to the working portion of the population. In the former case all the promises real and alleged could be commuted for a sum of money down, and the Indians would gradually disappear from here to re-appear in diminished numbers further west; but taking the latter view as the more desirable one, the necessity of helping the Indian rather with what he really requires than with what he thinks he wants seems to me to be beyond a doubt. And it must be mentioned that there is a wide difference between one band of Indians and another.[69]

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[68] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 11–12 (ICC Documents, pp. 87–88 and 103–4). Emphasis added.

[69] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 12 (ICC Documents, pp. 88 and 105).

The Prince Affidavit

Other Indians turned to their Member of Parliament, Dr John Schultz, to take up their cause. On September 23, 1872 – just 17 days after the meeting between St John and the Pembina deputation – Schultz wrote directly to Secretary of State Howe, noting not only the outside promises but also what appeared to have been misleading representations by the Crown's negotiators regarding the level of annuities paid to other Indians in Canada:

> They [the Indians] say, first, that at the Treaty of August, 1871, certain promises were made to them by the Commissioner which have not since been fulfilled.
>
> That these promises included work oxen, ploughs, harrows and other agricultural implements, indispensable to a people who, by the sale of their lands, would be compelled to give up the hunt and depend upon agricultural pursuits.
>
> That, owing to the high price of merchandise here, the three dollars per head which they get is quite insufficient to supply even fishing twine for their nets, and is not even equivalent to the loss of time entailed on those living at a distance in coming to the payment.
>
> That the treaty now in print is not as they understood it at the times [sic] when it was signed in August, 1871.
>
> That it was stated to them that no Indians in the other Provinces ever received more than three dollars per head for their lands, and that they have now reason to believe that the Government has before paid as high as four dollars per head.
>
> That the chief councillors and headmen alike only get three dollars per head, whereas in other parts of Canada the chief, councillors, etc., receive a considerable amount more than the ordinary members of the tribe.
>
> These are the complaints made by the band to which I have last alluded, and I have reason to believe that the same complaints are made by all the Indians of the Province; and it has lead [sic] to a general feeling that they are unfairly dealt with, and that the Government should take some steps at once to redress the grievance.
>
> To have, then, a wide-spread dissatisfaction among the Indians of the Province; this feeling is more likely to increase than decrease, and is certain to influence the Plain Crees and other tribes west of us, and may possibly lead to serious complication if the matter is not at once dealt with by the Government. I have therefore the honor to suggest that, as one of the means of arriving at a better understanding with the Indians, that you should make an appropriation sufficient to cover the expense of taking the principal chief, his subordinates and some competent

> interpreters to Ottawa, and allow them to confer with the Government in the same manner as is pursued so often at Washington and with such good results.[70]

At about the same time, on October 20, 1872, the Reverend Henry Cochrane, the Indian clergyman who had participated in the Treaty 1 negotiations as an interpreter and witness, also stepped forward on behalf of the Indian parties to the treaty. His request focused on schools and medical aid rather than the land and agricultural supplies and implements emphasized by Schultz:

> I have not the least doubt the terms of the Indian Treaty will be carried out to the letter. I see in it, that other Reserves in the Lower Provinces obtain assistance from the Government [illegible] others [illegible] of Missionaries, school teachers, medical assistance for the indigent poor. Now Sir, may I enquire from what sources are these obtained. If funds were available to help our Missionaries & School Teachers in the three Reserves which are already settled on by Natives it would be a great boon for our people.... This my dear Sir is merely an enquiry. I know "a school" is only promised in the Treaty when the Indians "desire it" but I am certain that the Government wuld [sic] help our poor Indians not only in Church and Schools but also in medical assistance (that would only apply in St. Peter's Reserves, as the other Reserves are at present out of reach of the Doctors) & for the indigent poor....[71]

Although the record contains no evidence of a reply to Cochrane, in October 1872, Deputy Superintendent Spragge responded to Schultz on Howe's behalf, apparently suggesting that the claims made by Schultz for the Indians did not accord with the treaty or that the Crown had satisfied its treaty obligations to the Indians.[72] On January 4, 1873, Schultz replied to Spragge:

> Referring to your letter of October last, on the subject of Indian affairs in Manitoba, I beg to state that I communicated its contents to the chiefs and headmen of the complaining Bands, but that they still insist and even with greater earnestness

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[70] John Schultz, MP, to Joseph Howe, Secretary of State for the Provinces, September 23, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 7 (ICC Documents, p. 91). Although Schultz alluded to the Indians having seen the printed text of the treaty, he was presumably referring only to the document approved by Order in Council on September 12, 1871, and not to the memorandum of outside promises, which, as we will see, did not become part of Treaties 1 and 2 until 1875.

[71] Henry Cochrane, Archdeacon, St Peter's Reserve, to Joseph Howe, Secretary of State for the Provinces, October 20, 1872, NA, RG 10, vol. 3582, file 930, reel C-10102 (ICC Documents, pp. 93–94).

[72] Spragge's letter to Schultz is not part of the record in this inquiry. We have inferred its content from Schultz's reply of January 4, 1873.

> than before, that the conditions of the treaty as interpreted*to* and understand [sic] *by* them have not been carried out, and have sent me the enclosed affidavit of parties present at the treaty, to bear out the statements which they made before and which they desire to be substantiated to you.
>
> On enquiring among respectable natives, who did not receive the treaty money, but who were present at the Councils which preceded the signing of the treaty, I am led to believe that the Indians have good grounds for their present state of dissatisfaction and in view of the consequences which are sure to follow a widespread disaffection among the Indian tribes I respectfully urge the Department to give the subject the immediate and earnest attention it is entitled to, with a view to removing the difficulty.[73]

The affidavit to which Schultz referred was the so-called Prince affidavit sworn on December 30, 1872, by David Prince, James Letter Sr, Henry Chief, Thomas Flett, William Bear, and Thomas Spence of the St Peter's Band. In addition to declaring, as we have already noted, that Lieutenant Governor Archibald and Indian Commissioner Simpson had promised to set the Crown's verbal promises down on a separate piece of paper, the deponents attested:

> That they are natives of the country and they understand both the English and Indian languages.
>
> That they were present at the signing of the Treaty at Lower Fort Garry last year, and did hear all the discussions which took place previous to the signing of said Treaty.
>
> That on the day when said Treaty was signed the chiefs did enumerate the articles which they demanded in addition to the Treaty money.
>
> That these articles enumerated were agricultural implements for the chiefs and headmen; waggons, horses, harness and suits of clothing; work oxen, bulls, cows, hogs, sheeps [sic], turkeys and fowls; *on each reserve, medical aid* and a school and school master; If they wished to take their treaty money in goods they would be supplied at Canadian prices....
>
> That these things have not been given, and that when they were demanded by the chief, Henry Prince, at the payment of this year, he could get no right answer from the Commissioner.[74]

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[73] John Schultz, MP, to William Spragge, Deputy Superintendent of Indian Affairs, January 4, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 8 (ICC Documents, p. 99).

[74] Affidavit of David Prince, James Letter Sr, Henry Chief, Thomas Flett, William Bear, and Thomas Spence, December 30, 1872,Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 9 (ICC Documents, p. 92).

When Spragge delivered Schultz's letter and the Prince affidavit to Howe, the Secretary of State was apparently surprised by the claim to medical aid. On February 8, 1873, Howe forwarded the letter and affidavit to Simpson with a request for "information as to promises of Medical Attendance if any, made the Indians of Manitoba at the time of the Treaties being effected with them."[75] Given Simpson's resignation in February 1873, the request eventually crossed Indian Agent St John's desk on March 1, 1873, for reply. Referring to his letter of February 24, 1873, in which he had listed the Indians' demands and his responses arising during the meeting of September 6, 1872, with the Pembina bands – including the declaration that the Indians "[m]ust take care of their own sick" – St John denied any recollection of medical aid as a treaty term and, at the same time, questioned the motives of Schultz and his aboriginal constituents:

> My letter of the 24th ult[imo], in reply to a telegram received from Deputy Superintendent Spragge, will have explained the asseveration [i.e., earnest assertions] of the Indians.
>
> There is however the question of medical aid, about which you specially ask, I do not remember any promise of this nature and I have never heard the subject mentioned until the receipt of your letter.
>
> I am a little surprised that the Indians should never have spoken of this in their recapitulations of the many things they believed themselves entitled to, until Dr. Schultz's meeting with the respectable natives who did not take the Treaty "money," and I can only assume that it may have occurred to them, that having been fortunate enough to secure that gentleman as their representative in Parliament, they would do well to cement the alliance by obtaining his services as their medical adviser.[76]

Despite St John's denial that medical aid comprised one of the promises made during the negotiation of Treaty 1, just two weeks later, on March 14, 1873, Spragge, in his annual report to Howe, "proposed to extend to Manitoba and the North-West Territories the system of providing medical treatment for the Indian population, which in the Provinces of Ontario and Quebec has been productive of such value and satisfactory consequences."[77]

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[75] Joseph Howe, Secretary of State for the Provinces, to Wemyss Simpson, Indian Commissioner, February 8, 1873, NA, RG 10, vol. 4382, item 309, reel C7407 (ICC Documents, pp. 100–1).

[76] Molyneux St John, Indian Agent, to Joseph Howe, Secretary of State for the Provinces, March 1, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 9 (ICC Documents, p. 108).

Spragge's Instructions to Provencher

Complaints from the Indians continued to filter into Ottawa. In July 1873, just five months after his installation as the new Indian Commissioner and one month after his arrival in Manitoba, J.A.N. Provencher reported a meeting with Indians claiming that treaty promises had not been fulfilled and that the treaty document "did not contain the true conditions of the surrendering of their lands."[78] In response, Spragge advised Provencher on July 18, 1873, that reserve surveys previously deferred pending the new Indian Commissioner's arrival would be allowed to proceed, with Provencher expected to be intimately involved in the selection process. Spragge's instructions then proceeded to address "the promises made to the Indians," but a significant portion of the most critical passage in this key document has been lost to the ravages of time:

> With reference to your letter of the 5th inst., and the promises made to the Indians
> 5 lines illegible
> St. John particularized the presents which it was understood that Governor Archibald & Commr. Simpson had promised should be given and by Telegram of the 31st of the following month Mr. St. John was informed that the recommendation contained in his letter would be complied with. Accordingly, the following may be purchased and delivered when the parties are prepared to receive them:–
> A Sow for each Chief; and
> A Boar Pig for each Reserve on the terms described in Mr. St. John's letter.
> For each Chief "a male and a female of each animal used by a farmer."
> The maintaining of a School on each of the Reserves specified.
> one line illegible
> will be given to each Band.
> *Medicines for the sick will be provided.*

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[77] William Spragge, Deputy Superintendent of Indian Affairs, to Joseph Howe, Secretary of State for the Provinces, March 14, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 6 (ICC Documents, p. 112).

[78] J.A.N. Provencher, Indian Commissioner, to unidentified recipient, July 18, 1873 (ICC Documents, pp. 119–20).

> Scythes will be given to those Indians who require to use them.
>
> The Commissioner and Agents must carefully protect the Timber on the Indian Reserves from plunder and destruction and waste.
>
> You will use your discretion with reference to the delivering [of] farm animals and other [illegible] keeping in view their [illegible] of taking care of them.[79]

Two other documents referred to in this correspondence which might have shed additional light on the gaps in Spragge's instructions – Provencher's letter of July 5, 1873, and the telegram sent to St John on the 31st of an unspecified month – have unfortunately never been found.

Despite the apparently good intentions embodied in Spragge's letter, St John remarked on October 22, 1873, that the Indians remained irritated not only by the Crown's failure to comply with the treaty terms, as the Indians understood them, but also by those terms being less favourable than those granted to Indians elsewhere:

> Although the demands of the Indians have been of late somewhat more moderate than formerly, they are not content with the terms of the Treaty and are unanimous in the belief that they have been deceived and promised more than they have received.
>
> In one instance I thought it advisable to explain how this difference between the Indians and the Commissioner arose; but while they accepted the explanation as justifying the position I assumed, they said there could be no satisfaction about the matter until I or some one else was authorized to re-arrange the bargain.
>
> This, it should be remembered, was prior to the negotiation of the Treaty at the North-west angle of Lake of the Woods [Treaty 3], and looking to the extraordinary disparity between the terms granted in Treaties 1 and 2 and at the N.W. Angle I do not entertain the least hope of being able to satisfy the Indians of the former Treaties under the altered condition of affairs. Not an item granted to the Indians eastward of the province will be forgotten by the others, nor will the latter omit to point out, as Lt. Gr. Archibald's printed dispatch has already told them, that they are giving up valuable prairie lands while the Indians of the east are surrendering rock and muskeg.[80]

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[79] William Spragge, Deputy Superintendent General of Indian Affairs, to J.A.N. Provencher, Indian Commissioner, July 18, 1873, NA, RG 10, vol. 4384, no. 747, reel C7408 (ICC Documents, pp. 123-25). Emphasis added. The document in the records, including the notation of illegible lines, is a handwritten copy of an earlier version.

[80] Molyneux St John, Indian Agent, to J.A.N. Provencher, Indian Commissioner, October 22, 1873, Canada, Parliament, *Sessional Papers*, 1875, No. 8, "Annual Report of the Department of the Interior for the Year Ended 30 June 1874, Report of the Deputy Superintendent of Indian Affairs," p. 61. The documentary record in this inquiry includes an excerpt from this document in transcribed form (ICC Documents, p. 134).

Similarly, Provencher observed in his year-end report for 1873 to the Minister of the Interior, David Laird, that the Indians of Manitoba remained dissatisfied:

> On my arrival here, in the beginning of June last, the different Chiefs of Bands in the vicinity of Fort Garry hastened to visit me to express their satisfaction at the arrival of a Resident Commissioner, and moreover to represent their wants and grievances.
>
> As has been frequently advised by all who engage with Indian Affairs in this part of the Dominion, there is no doubt that serious misunderstandings exist in the locality of the treaties concluded in 1871.
>
> The sum of money to be paid by the Government was clearly fixed; and those who received it, though maintaining that it was too little, yet understood till last autumn that it could not be augmented. But in spite of this the representative of the Canadian Government, at that period, made them many promises, still undetermined as to details, and of which those interested now claim the fulfilment, with a persistence the greater as their expectation has lasted two years.
>
> They do not perfectly agree as to the nature of these promises, and some Chiefs have announced the most exaggerated pretensions on this subject. They think that the Government has undertaken to furnish them first-class residences; clothes of a superior quality, and provisions of their own choice for them and their families; but putting aside what is impossible and absurd in these different rumors, it is undoubted that by an interpretation put by the Indians on the words of the Commissioners, that they who were present at the treaties Nos. 1 and 2, were led to expect many more benefits than were expressed in those two treaties; and in the meantime they almost accuse the representatives of Canada of obtaining their consent under false pretences [sic].
>
> We can easily understand how such charges, however ill-founded, may raise difficulties in the future.
>
> All these Indians are in communication with each other, and the dissatisfaction of any, whether with or without reason, cannot fail to exercise an influence on the minds of others.
>
> Up to the present time, it is true, we have not had occasion to realize these doubts, but it is none the less in the interest of the tranquility of the future, to prevent all pretexts at defiance on the part of the Tribes with whom the Government may find it advisable to conclude new treaties.[81]

Provencher recommended that, in the interests of both the Indians and the government, and "to avoid all causes of misunderstanding and dissatisfaction in the future," new treaties should be made "on a more definite basis." With more particular reference to Treaty 1, he urged that steps be taken "as soon as possible, to arrive at a thorough understanding on all points under discussion."[82]

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[81] J.A.N. Provencher, Indian Commissioner, to Minister of the Interior, December 31, 1873, Canada, Parliament, *Sessional Papers*, 1875, No. 8, p. 53 (ICC Documents, p. 126).

Recommendations of the Board of Indian Commissioners

Although the record is not clear how it came about, sometime in 1873 Canada appointed a Board of Indian Commissioners to review the Indians' concerns and devise a means for resolving them. The board consisted of Indian Commissioner Provencher and Alexander Morris, who had succeeded Archibald as Lieutenant Governor of Manitoba and the North-West Territories. Indian Agent St John, the only one of the three who had actually participated in the treaty negotiations, acted as secretary, and his record of the March 13, 1874, meeting states:

> After full discussion the following resolutions were adopted and the Lieutenant Governor was requested to transmit the same to the Minister of the Interior that is to say:–
>
> 1st. Repeated complaints having been made to the Lieutenant Governor and to the Indian Commissioner by the Indians who were parties to the Stone Fort Treaty, whereby they alleged that certain articles had been promised to be given them which were not included in the treaty, and, whereas the Indians have asserted these promises ever since the making of the Treaty;– The Indian Board have given the matter their careful consideration and having made inquiry into the matter and *having found that there were some promises made which were not included in the Treaty, but not to the extent or of the character claimed by the Indians*, they are of opinion that it would be desirable if possible to put an end to these constant complaints and demands of the Indians.
>
> They would therefore recommend, that *without recognizing the alleged promises in their entirety*, the Privy Council should announce to the Indians, that *without in any way interfering with the provisions of the Treaty*, which are binding alike on the Government and the Indians, the Governor General in council had resolved, out of the benevolence of Her Majesty, to give the Indians, parties thereto, as a supplement to their existing annuities & other benefits under the Treaty, the following viz:–
>
> 1st. One plough & harrow for every four families on their actually settling on the Reserve and commencing to farm.
>
> 2nd. One axe, two hoes, one spade, a scythe for each head of a family.

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[82] J.A.N. Provencher, Indian Commissioner, to Minister of the Interior, December 31, 1873, Canada, Parliament, *Sessional Papers*, 1875, No. 8, p. 55 (ICC Documents, p. 128).

> 3rd. One pair of oxen for every ten families settled on the Reserve.
>
> 4th. A cow to every chief not already having received one.
>
> 5th. A bull for each Reserve if required.
>
> 6th. Tools for building purposes for each Reserve, of such amount as the Commissioner may deem necessary.
>
> 7th. The Schools to be maintained as provided for by the Treaty, the importance of which is strongly urged.
>
> 8th. The Commissioner to be authorized to employ, from time to time, a Farmer and a carpenter, for such limited period of engagement as shall be found necessary, to aid the Indians in farming on any Reserve, or in building on the same.
>
> 9th. *A supply of simple medicines to be provided for each Reserve, and placed in the custody of some suitable person.*
>
> 10th. Seed Wheat, Potatoes, and garden seeds.
>
> 11th. Certain [illegible] of goods to be purchased by the Indian Department and kept on stock to be distributed to the Indians at cost price on account of their annuities by the local agents.
>
> 12th. Ammunition and twine, fifteen hundred dollars per annum for the Treaty.
>
> 13th. Clothing for Chiefs and four officers once every three years.
>
> 14th. A flag and Silver medal for each Chief.
>
> 15th. Twenty-five dollars to each chief and fifteen dollars to each of four councillors, these payments to the chiefs and councillors to be approved by the Chief Indian Agent as to their rank as such, and its continuance dependent on their good conduct, and further, that an addition be made to the annuity of two dollars per head, and that the annuities may be payable semi-annually in the event of sub-agents being appointed and its being found expedient.[83]

Since the Indians of Treaty 2 had been promised by the Crown's treaty negotiators to be placed "on the same footing" as the Indians of Treaty 1, the board further proposed that its recommendations apply to the signatories of that treaty as well.

It is evident that the board considered the written form of Treaty 1, as ratified by Order in Council, to be the "treaty." Moreover, although Provencher and Morris acknowledged that the written form of the "treaty" certainly understated the promises that had been made to the Indians during the treaty negotiations, they also concluded that Indian claims regarding the extent of the outside promises were overstated. Accordingly, while they were prepared to make recommendations to settle the matter, they were careful not to equate their recommendations with prior "alleged" promises or to recognize "the alleged promises in their entirety."

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[83] Minutes of a meeting of the Board of Indian Commissioners, March 13, 1874, NA, RG 10, vol. 3608, file 3117, reel C-10105 (ICC Documents, pp. 135–40). Emphasis added.

For whatever reasons, however, the board's recommendations were apparently not accepted or otherwise acted upon by the government. As Edgar Dewdney commented in 1880, after succeeding Provencher as Indian Commissioner, "[t]hese recommendations (with the exception of No. 11 which I think was injudicious) if assented to at the time would[,] I have no doubt[, have] been satisfactory to the Indians, but no action appears to have been taken" on them.[84]

When Morris met with Chief Yellow Quill and the members of the Portage Band in the summer of 1874 to mark out their reserve, he encountered resistance in relation to the outside promises and to the lands to be set apart – in both cases arising from the differences between the Indians' recollections of the treaty promises and the written text of Treaty 1. Moreover, Chief Yellow Quill expressed concern that, although Archibald and Simpson had promised that "all the Indians were to be treated alike ... the Indians at the North West Angle [Treaty 3] had been paid more." Given that the government had "already been furnished with corroborative testimony" regarding the outside promises, Morris recommended the report of the Board of Indian Commissioners to the Minister of the Interior and strongly urged a decision: "[T]he harm that arises from the Indian mind being impressed with the belief that the white has broken his promises is very great, spreading as it will do through all the Tribes."[85]

THE AMENDMENT OF TREATIES 1 AND 2

The ongoing complaints prompted the Minister of the Interior, David Laird, to take personal charge of the matter. He toured Manitoba during the summer and early fall of 1874, meeting with representatives from "every leading band in the Province."[86] On September 30, 1874, three chiefs, including Ke-we-tay-ash, who had signed Treaty 1 on behalf of the Roseau River Indians, provided Laird with a letter outlining the failure of the Crown's representatives to fulfill the terms of the treaty:

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[84] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, April 24, 1880, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 215–16).

[85] Alexander Morris, Lieutenant Governor, Province of Manitoba, to Minister of the Interior, July 24, 1874, NA, RG [10], vol. 3611, file 3730 (Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, pp. 154–61).

> They don't follow the agreement at all. It is not for three dollars a head that I would have sold my land. I sold neither signed the treaty. Before they had promised me what I asked but now they don't even give us enough to eat. I never sold my land only at Stone Fort and Now we all the Chiefs want our rights of the treaty.[87]

The following day – October 1, 1874 – Laird met in Winnipeg with residents of the Roseau River reserve, who picked up where the letter had left off:

> Red Bone said, I am not going to say everything just now, only to lodge a few complaints. I am very glad to have met you, and have something very important to say. I want to speak about the Treaty. It has not been fulfilled by the parties who made it with them. What is stated in the letter you received yesterday are facts. Of all the promises that were made we only received the $3.00 per head. We never would have made the Treaty if it was not for the promises that were made besides the $3.00 per head. Now when we see one of our great Mother's representatives here we expect to get what was promised us. I just felt as if it were the first time I had seen daylight when I heard of your arrival here. The impression of all the Indians out there is that you will cause the promises to be fulfilled if you hear the complaints fully. We want nothing more than the promises, when we get that we will be contented. I am speaking for all, and would like to get before we start for home all that was promised in the Treaty....
>
> The Indian said he had been one of the speakers when the Treaty was made, that he was stupid but he had not forgotten the promises made and which they cannot deny were made. There are plenty of people who heard Simpson and Archibald promise. They would not ask for them if they had not been made.[88]

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[86] David Laird, Minister of the Interior, to Governor General in Council, April 27, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, p. 180).

[87] Ke-we-tay-ash, Wa-na-wan-na-nang, and Wa-quan, Chiefs, to [David Laird, Minister of the Interior], September 30, 1874, NA, RG 10, vol. 3598, file [illegible], reel C-10104 (ICC Documents, p. 142).

[88] "Report of an Interview between the Honorable the Minister of the Interior, and certain Indians residing on the Reserve at Roseau River, at Winnipeg, [Manitoba]," October 1, 1874, NA, RG 10, vol. 3598, file [illegible], reel C-10104 (ICC Documents, pp. 144–46).

On his return to Ottawa, Laird prepared a memorandum to the Governor General in Council on April 27, 1875, in which he reviewed the outside promises and his recommendations for their resolution. With regard to the written form of Treaty 1, he stated:

> The undersigned has the honor to bring under the consideration of His Excellency the Governor General in Council, the very unsatisfactory state of affairs arising out of the so called "outside promises" in connection with the Indian Treaties Nos. 1 and 2....
>
> Of the matters thus stated to have been promised during the negotiations as enumerated in the above extract from Mr. Commissioner Simpson's Despatch [of November 3, 1871], the only one actually embodied in the Treaty, in addition to the usual stipulation respecting Reserves and Schools, is the annual payment of $3.00 to each Indian in perpetuity.
>
> Of the other things promised, a memorandum was, however, subsequently made.[89]

After setting forth the terms of the memorandum of outside promises, Laird continued:

> From that moment to the present these *outside promises* have been a source of constant embarrassment to the Department, and it is to be observed that the Order in Council passed on 12th September 1871, confirming the Treaty concluded on the 3rd August of that year takes no notice whatever of the memorandum above referred to.
>
> The memorandum it may be remarked is attached to the *original Treaty* which it is probable did not reach the Department until after the Order in Council was passed.
>
> The validity of the promises thus made would appear however, to have been admitted by the then Deputy Superintendent General of Indian Affairs....
>
> These "outside promises" have also repeatedly been referred to and partially at least recognized in the official Despatches of their Honors Lt. Governors Archibald and Morris and in the reports of the Indian Commissioners [Simpson and Provencher], and also in the minutes of the N.W. Council.[90]

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[89] David Laird, Minister of the Interior, to Governor General in Council, April 27, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 149, 151–52). The copy of this memorandum in the record of this inquiry is very poor, with many revisions, deletions, and marginal notes, several of which are virtually illegible. For clarity, we have referred to a clean, revised copy of the memorandum in the record of the Long Plain loss of use inquiry (Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, pp. 168–84 at 168, 171).

[90] David Laird, Minister of the Interior, to Governor General in Council, April 27, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 153–55; Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, pp. 174, 176). Emphasis in original.

After reproducing excerpts from Spragge's letter of March 14, 1873, St John's letter of October 22, 1873, and Provencher's letter of December 31, 1973, Laird concluded:

> That the dissatisfaction among the Bands of Indians included under Treaties 1 and 2, arising out of the misunderstanding as to the nature and extent of the so-called "outside promises," is deep and widespread, the undersigned had ample means of ascertaining while on his visit to Manitoba last summer. He was met by deputations from every leading band in the Province; and while some of their complaints were unreasonable they all appeared to agree that faith had not been kept with them in regard to the articles promised to be distributed among them....
>
> In order to make the present position of this matter intelligible, the undersigned has felt obliged to go to some length into the history of the case, and he thinks it is apparent in view of what has been stated that it is now imperatively necessary for the Government to take steps once and forever to dispose of this matter on a basis which will be satisfactory to the Indians interested in Treaties Nos. 1 and 2.
>
> It seems clearly made out that these so called "outside promises", to the extent at least of what is set forth in the memorandum attached to Treaty No. 1 and in the official letter of Mr. Commissioner Simpson, are officially sanctioned by that officer, that their fulfillment was from the first, and persistently since claimed by the Indians, that such claims have been strongly urged by their Honors Lt. Governors Archibald and Morris, and by Mr. Commissioner Provencher and finally that they have been to a large extent admitted, and to some extent carried out by the Indian Department.
>
> In conclusion the undersigned would respectfully recommend;-
>
> 1st. That the written memorandum attached to Treaty No. 1 be considered as part of that Treaty and of Treaty No. 2, and that the Indian Commissioner be instructed to carry out the promises therein contained in so far as they have not yet been carried out, and that the Commissioner be advised to inform the Indians that he has been authorized so to do.
>
> 2nd. That the Indian Commissioner be instructed to inform the Indians, parties to Treaties Nos. 1 & 2, that, while the Government cannot admit their claim to anything which is not set forth in the Treaty and in the memorandum attached thereto, which Treaty is binding alike upon the Government and upon the Indians, yet, as there seems to have been some misunderstanding between the Indian Commissioner and the Indians in the matter of Treaties 1 and 2, the Government out of good feeling to the Indians and as a matter of benevolence, is willing to raise the annual payment to each Indian under Treaties 1 and 2 from $3.00 to $5.00 per annum, and make payment over and above such sum of $5.00 of $20.00 each and every year to each Chief and a suit of clothing every three years to each Chief and each Headman, allowing two Headmen to each Band, on the express understanding however, that each Chief or other Indian who shall receive such increased annuity or annual

> payment, shall be held to abandon all claim whatever against the Government in connection with the so-called "outside promises" other than those contained in the memorandum attached to the Treaty.[91]

Three days later, on April 30, 1875, the Governor General in Council passed an Order in Council adopting Laird's recommendations word for word.[92]

Lieutenant Governor Morris was instructed to meet with the Treaty 1 and 2 bands to secure their agreement to the proposed amendment, but he recognized that he lacked sufficient time to meet with all of them that fall. Accordingly, while he proceeded to Manitoba House to negotiate with the Treaty 2 Indians, he seconded Indian Commissioner Provencher to meet with the bands of Treaty 1.[93] Provencher secured adhesions to the treaty amendment from the Indians at Fort Alexander on August 23, 1875, and at Broken Head River on August 28. He then proceeded to Roseau River, where the Band adhered to the amendment on September 8. In general, the Indian Commissioner reported that he was well received:

> I am happy to be in a position to inform you that the intercourse between the Indians and the Government, through me, has been of the most peaceful nature, and denotes, on the part of the former, a general feeling of satisfaction and of contentment.
>
> The appearance of difficulties, which had been anticipated the preceding year, and which had been considerably exaggerated by the circulation of outside rumours, entirely disappeared when sufficient explanations had been given.
>
> The Indians now understand the position secured to them by the treaties; and, if all causes of misunderstanding have not yet disappeared, they only bear on minor details and cannot create any serious disagreement....

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[91] David Laird, Minister of the Interior, to Governor General in Council, April 27, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 158–60; Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, pp. 180–84). The first and third paragraphs of this excerpt are included in the Long Plain version of the memorandum only.

[92] Order in Council, April 30, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 161–64).

[93] Alexander Morris, Lieutenant Governor, Province of Manitoba, to [David Laird, Minister of the Interior], October 4, 1875, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991), 133 (ICC Documents, p. 174).

> I already had the honour to mention, in a former report, that at the time of the execution of the Treaties in 1871, several promises, not mentioned in the Treaties, had been made to the different Tribes, and that the nature and particulars of those promises were of too indefinite a character to allow of a settlement without calling a new convention to annul all engagements – real, or given as such – with the exception of those expressly mentioned in the Treaties.
>
> This solution has been accepted by the Government, who now offer an annuity of $5 per head, instead of $3, on condition that all claims not mentioned in Treaties shall be given up. All the Indians of Treaties 1 and 2 have eagerly accepted that proposition, with the exception of one Band [the Portage Band under Yellow Quill], who refused on private grounds – that is, in reference to the extent of the Reserve to be granted to them.[94]

The agreement so "eagerly accepted" consisted of the April 30, 1875, Order in Council with the assents of the various bands endorsed on the back. The Roseau River Indians assented in these terms:[95]

> We the undersigned Chiefs and Headmen of Indian bands representing bands of Indians who were parties to the Treaties Nos. 1 and 2 mentioned in the report of a Committee of the Queen's Privy Council of Canada, as [approved on April 30, 1875, and] printed on the other side of this sheet, having had communication thereof and full understanding of the same, assent thereto and accept the increase of annuities therein mentioned, on the condition therein stated, and with the assent and approval of their several bands, it being agreed, however, with the Queen's Commissioners, that the number of braves and councillors for each Chief shall be four, as at present, instead of two, as printed.[96]

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[94] J.A.N. Provencher, Indian Commissioner, to Superintendent General of Indian Affairs, October 30, 1875, Department of Indian Affairs, Annual Report, 1875, pp. 31–32 (ICC Documents, pp. 177–78).

[95] Alexander Morris, Lieutenant Governor, Province of Manitoba, to [David Laird, Minister of the Interior], October 4, 1875, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991), 134 (ICC Documents, p. 175).

[96] *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer and Controller of Stationery, 1957), 9 (ICC Documents, p. 173).

Once Chief Yellow Quill and the Portage Band endorsed the Order in Council in 1876, all Treaty 1 and 2 bands were party to the amendment. At that point, the memorandum of outside promises officially became part of Treaties 1 and 2.

From these government accounts of the treaty amendment proceedings, it would appear that the Indian participants considered the revisions to be cause for celebration. However, in the present inquiry, the members of the Roseau River Anishinabe First Nation submit that, in the course of amending Treaty 1, their forefathers did not fully comprehend or appreciate what they had been asked to relinquish.

RESERVE CREATION AND SURRENDER

In the midst of the bitterness felt by the Indian signatories to Treaties 1 and 2 regarding the outside promises, additional resentment surfaced when non-aboriginal settlers encroached on lands earmarked for future reserves to acquire scarce supplies of wood for building, fencing, and fuel. Not surprisingly, many bands were anxious to have their reserves marked and set apart without delay so that their resources could be better identified and protected. As the Commission has already noted in its report dealing with the mediated settlement of the Roseau River Anishinabe First Nation's treaty land entitlement claim:

> Immediately following the signing of Treaty 1, the Anishinabe Chiefs expressed their concern about the level of protection that the agreement was providing for their lands. Dissatisfaction mounted over the delay in surveying the promised reserve, the continuing encroachment of settlers on their land, and timber permits being granted on lands that the Anishinabe understood had been promised to them. The Anishinabe wanted to have a reserve that straddled the Roseau River and that ran along its length. It was not until 1874 that a proposed site was marked off at the mouth of the Roseau River. This was not, however, the final survey. The official survey did not occur until 1887, when a plan was prepared by the Dominion Land Surveyor. What was surveyed, however, was a *block-shaped reserve* that extended back from the river, not along its length.
>
> The lands that eventually became the reserve (or reserves) were not set out until 1887 and 1888. By this time much of the land desired by the Anishinabe, and which they understood to be theirs, had already been alienated. Consequently, the designated reserve lands were in a different location from the reserve that the Anishinabe had understood would run along the river. In the end, the Roseau River

> Anishinabe First Nation asserted that Canada did not fulfill its promise to the Band to set aside the reserve promised to it by the terms of Treaty 1.[97]

Ultimately, the Band received Indian Reserve (IR) 2, which comprised roughly 13,500 acres[98] at the confluence of the Red and Roseau Rivers.

In the context of the present inquiry regarding the alleged treaty right to medical aid, the significance of the reserve is that a portion of it was later surrendered in 1903 on these terms:

> KNOW ALL MEN BY THESE PRESENTS, THAT WE, the undersigned Chiefs and Principal men of the Roseau River Band of Indians resident on our Reserves No. 2 and 2a in the Province of Manitoba and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, do hereby release, remise, surrender, quit claim, and yield up unto OUR SOVEREIGN LORD THE KING, his heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying, and being in the said Reserve No. 2 in the Province of Manitoba containing by admeasurement twelve square miles be [sic] the same more or less and being composed of all that portion of the Indian Reserve No. 2 (two) on the Roseau River, as shown by a map or plan of the said Reserve made by A. W. Ponton D.L.S in September and October 1887....
>
> TO HAVE AND TO HOLD the same unto His said Majesty THE KING, his Heirs and Successors forever, in trust to Sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.
>
> AND upon the further condition that all moneys received from the Sale thereof, shall, after deducting the usual proportion for expense of management, be placed to the credit of the Roseau River Bands of Indians.
>
> AND WE, the said Chief and Principal men of the said Roseau River Bands of Indians do, on behalf of our people and for ourselves, *hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be*

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[97] Indian Claims Commission, *Roseau River Anishinabe First Nation Report on Treaty Land Entitlement Inquiry (Mediation)* (March 1996), reported (1998), 6 ICCP 3 at 10–12. Emphasis in original.

[98] Jim Gallo, Treaties and Aboriginal Rights Research, Manitoba Indian Brotherhood, "Notes on the Establishment of Roseau River I.R. No. 2 1871–1882," September 24, 1979 (ICC Exhibit 8, tab 17, p. 4). Gallo relies on a figure of 13,554 acres based on "Schedule G, Shewing Indian Reserves Surveyed" in Canada, Parliament, *Sessional Papers*, 1875, No. 8, p. 55, whereas D.N. Sprague cites a figure of 13,349.84 acres based on Orders in Council dated January 20, 1917, and November 21, 1913, confirming IRs 2 and 2A: D.N. Sprague, "Reserve Entitlements under Treaty Number One: The Case of 'Land on the Roseau River,'" June 14, 1993 (ICC Exhibit 8, "History" tab, p. 27). Another paper, which Sprague refers to as an "earlier work by Gallo in which he mistakenly concluded that 1874 was the date of first survey," also employs the 13,349.84 figure: "Treaty Land Entitlement in Manitoba," undated (ICC Exhibit 8, tab 16, p. 10), as given in the Sprague paper at p. 23, footnote 47.

> *lawfully done, in connection with the capital, and interest that may accrue from said capital secured from the sale of lands herein surrendered.* It is further understood and agreed that a survey shall be made of the lands surrendered and the lands sold at the earliest possible date. It is further understood and agreed that one tenth of the amount realized from said sale shall be expended [as] soon as available for such articles or commodities as the Indians may desire and the Department approves of. Any advances made at this time, or at any time subsequent to the sale of said land to be repaid from the 10% before mentioned. It is further agreed that the Department shall purchase for the Bands two sections of land adjacent to the reserve known as Reserve No. 2a, or Roseau Rapids, said lands to be purchased as soon as funds are available.[99]

Following the surrender, the Inspector of Indian Agencies, S.R. Marlatt, reported on June 19, 1903, to Indian Commissioner David Laird – the same man who, as the Minister of the Interior, had 27 years earlier recommended the amendment of Treaty 1. Marlatt outlined his intentions regarding how the "one tenth of the amount realized from said sale" should be spent "to the best advantage of the Indians." He continued:

> In looking at this question there are certain facts that should be taken into consideration, such as: The surrender was obtained not by the desire of the Indians but by the strong wish of the Department, it was with great difficulty secured and only after a clear understanding that the 10% would be available almost immediately after the sale....
>
> ... last but most important it will be but a short time until they are again asked to surrender the balance of the reserve, and unless they are generously and fairly treated according to their own ideas at this time they will be very slow to sign another surrender.[100]

Frank Pedley, the Deputy Superintendent General of Indian Affairs, approved Marlatt's proposal, adding that "no doubt [it] is felt that you will use your best endeavors to make use of the money in the way which will most greatly benefit the Indians."[101] Just six years later, in 1909, the government began applying funds from the Band's interest trust account to the payment of the Band's medical expenses.

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[99] Surrender of portion of IR 2A, January 30, 1903, DIAND, Indian Lands Registry, Instrument R5294 (ICC Exhibit 4, pp. 70–71); see also Canada, *Indian Treaties and Surrenders*, vol. 3 (Ottawa: King's Printer, 1905–12; reprinted Edmonton: Fifth House Publishers, 1993), 375–76 (ICC Documents, pp. 238–39). Emphasis added.

[100] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, June 19, 1903, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, pp. 73–74).

THE PROVISION OF MEDICAL AID

To better understand the First Nation's claim that the deductions from its interest account were inappropriate and indeed unlawful, it is necessary to review the manner in which medical aid was delivered to the people of Roseau River and other bands – before Treaty 1 was signed in 1871, in the interval between Treaty 1 and its 1875 amendment, and following the treaty amendment until 1934, when deductions from the First Nation's interest account ceased.

Medical Services before 1871

There is no evidence before the Commission regarding Canada's delivery of medical services before 1870 to the Indians of the vast region that became Manitoba and the North-West Territories. In those early years, that territory was still known as Rupert's Land and comprised the domain of the Hudson's Bay Company. Canada's jurisdiction – and any responsibility it might have had to provide medical aid – had not yet extended that far.

Within a few months of Manitoba's entry into Confederation in May 1870 – and before the negotiation of Treaty 1 – Canada was forced to confront a serious smallpox epidemic that "raged throughout the ... summer,"[102] threatening to claim the lives of significant numbers of the aboriginal inhabitants in the newly acquired territory. Lieutenant Governor Archibald met with Henry Prince on September 13, 1870, to request a postponement of treaty negotiations until the following year, including among the reasons for delay the need to disperse the Indians to reduce the risk of spreading the infection.[103] The next month, on October 24, 1870, the Secretary of State for the Provinces, Joseph Howe, instructed Archibald to take more concrete measures:

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[101] Frank Pedley, Deputy Superintendent General of Indian Affairs, to S.R. Marlatt, Inspector of Indian Agencies, June 24, 1903, NA, RG 10, vol. 3731, file 26306-2, reel C-10127 (ICC Exhibit 4, p. 76).

[102] W.J. Christie, Chief Factor, In charge of Saskatchewan District and Hudson's Bay Company, to Adams G. Archibald, Lieutenant Governor, Province of Manitoba, April 13, 1871, Canada, Parliament, *Sessional Papers*, 1872, vol. 7, No. 22, p. 32 (ICC Exhibit 8, tab 2).

> The spread of the Small Pox among the Indians is much to be deplored and ought if possible to be prevented or mitigated by general vaccination. You will turn your attention to this subject without delay and I shall be glad to be informed to what extent and by what Agencies it is in your power to control this loathesome disease.[104]

From these brief excerpts it may be seen that, before the treaty was signed, Canada had already undertaken some steps to provide for the health and welfare of Indians in the west. Indeed, by 1869, the legislation at the heart of this inquiry – section 8 of *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42* – had been put in place and remained substantially unchanged in various versions of the *Indian Act* during the entire period to which the claim relates. Section 8 stated:

> **8.** The Superintendent General of Indian Affairs in cases where sick or disabled, or aged and destitute persons are not provided for by the tribe, band or body of Indians of which they are members, may furnish sufficient aid from the funds of each tribe, band or body, for the relief of such sick, disabled, aged or destitute persons.[105]

Canada's researcher, Frances Foley Smith, suggests that, when the time came to negotiate Treaty 1, medical aid may have been provided "without treaty stipulation" as a matter of fairness and equal treatment of the Indians of Treaty 1 and the later numbered treaties with the aboriginal peoples of central and eastern Canada:

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[103] "Notes of Interview between the Lieut. Governor of Manitoba and Henry Prince (Miskookeenu), Chief of the Salteaux [sic] & [illegible] at St. Peters Parish School," September 13, 1870, PAM, MG 12 A1, RM 1-1, No. 22 (ICC Documents, p. 10).

[104] Joseph Howe, Secretary of State for the Provinces, to Adams G. Archibald, Lieutenant Governor, Province of Manitoba, October 24, 1870, PAM, MG 12 A1, RM 1-1, No. 55 (ICC Documents, pp. 14–15).

[105] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c. 6, s. 8.

> The government repeatedly undertook to treat equally with all Indians in the country. In the course of Treaty One negotiations, Governor Archibald promised to "deal fairly with those of the setting sun, just as she would with those of the rising sun ... she (Queen) will not do less for you".... [E]astern bands were already receiving substantial medical aid at the time Treaty One was signed, without treaty stipulation. However, it was a pay as you can policy.[106]

Medical Services, 1871–75

Within months of the execution of Treaty 1, and in the context of Archibald's repeated complaints about Wemyss Simpson's neglect of his responsibilities as Indian Commissioner, Howe provided Archibald with $330 on February 27, 1872, for contingent expenses that might arise in assisting needy Indians during the winter of 1871–72:

> You will apply this money for the relief of such aged, poor or sick Indians as may require aid throughout the winter. It is the policy of the Canadian Government not to encourage pauperism but industry among the Indians, and in future the larger portion of the funds will be expended with a view to encourage them to self-exertion and permanent improvement.[107]

Nevertheless, seven months later, on September 6, 1872, on receiving the delegation from the "Pembina bands" seeking to enforce what they understood to be the terms of Treaty 1, Indian Agent Molyneux St John, as we have seen, advised the Indians that they "[m]ust take care of their own sick."[108] In subsequent months, prompted by the Reverend Henry Cochrane's request for "medical assistance for the indigent poor"[109] and John Schultz's delivery of the Prince affidavit claiming

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[106] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, pp. 8–9 (ICC Exhibit 2).

[107] Joseph Howe, Secretary of State for the Provinces, to Adams G. Archibald, Lieutenant Governor, Province of Manitoba, February 27, 1872, NA, RG 10, vol. 4376, no. 913, reel C7404 (ICC Documents, pp. 76–77).

[108] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 12 (ICC Documents, pp. 88 and 105).

[109] Henry Cochrane, Archdeacon, St Peter's Reserve, to unidentified recipient, October 20, 1872, NA, RG 10, vol. 3582, file 930, reel C-10102 (ICC Documents, pp. 93–94).

"medical aid" as a treaty promise,[110] Howe sought, on February 8, 1873, to be briefed on "promises of Medical Attendance if any" made to the Indians during the negotiation of Treaty 1.[111] On March 1, 1873 – just five days after reporting his advice to the Pembina bands during the preceding September that they were to care for their own sick – St John responded to Howe that he did not recall a treaty promise of medical aid and had "never heard the subject mentioned until the receipt of your letter."[112]

Within two weeks, Deputy Superintendent William Spragge issued his March 14, 1873, proposal "to extend to Manitoba and the North West Territories the system of providing medical treatment for the Indian population, which in the Provinces of Ontario and Quebec has been productive of such value and satisfactory consequences."[113] However, Smith comments that little is known about the system to which Spragge referred:

> Despite extensive research no definitive statement concerning [the] government "system of providing medical treatment to the Indian population" in the Provinces of Ontario and Quebec could be located for the first few decades following Confederation.
>
> However, in his report for the year ending June 30, 1872 Howe does shed some light on the subject when he notes that:
>
> > In those Provinces (Ontario and Quebec) many of the bands ... maintain their own agents, doctors, and schoolmasters....
>
> An examination of the Indian Branch financial statements for the years ending June 30, 1872 reveals a substantial number of cases in which costs of medicines, doctors salaries, "medical comforts" etc. were charged to individual band accounts.

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[110] John Schultz, MP, to William Spragge, Deputy Superintendent of Indian Affairs, January 4, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 8 (ICC Documents, p. 99).

[111] Joseph Howe, Secretary of State for the Provinces, to Wemyss Simpson, Indian Commissioner, February 8, 1873, NA, RG 10, vol. 4382, item 309, reel C7407 (ICC Documents, pp. 100–1).

[112] Molyneux St John, Indian Agent, to Joseph Howe, Secretary of State for the Provinces, March 1, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 9 (ICC Documents, p. 108).

[113] William Spragge, Deputy Superintendent of Indian Affairs, to Joseph Howe, Secretary of State for the Provinces, March 14, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 6 (ICC Documents, p. 112).

> It is also interesting to note that similar expenditures were made from the Indian Land Management Fund. (This was an administrative fund consisting of 10% of sales of Indian land).
>
> In Lower Canada (Quebec) expenditures registered in 1872 for medicines, doctors salaries etc., were debited to the Lower Canada Indian Fund. (The origins of [this] trust fund which boasted a substantial amount of capital is unclear. Nevertheless it is clear that this was a "Trust Fund" which belonged "exclusively to ... and [was] employed for the benefit of the Indians of Quebec." It was supplemented annually by legislative appropriations as was the Indian Land Management Fund and many of the other Indian funds). In subsequent years debits to individual Quebec Band accounts occur as well. (For example see Return B, 1873 annual report)
>
> With respect to the rest of the country disbursements for medicines, doctors etc., appear to have been made from the "Indian Fund" of each respective province or territory. [Deputy Superintendent General] Lawrence Vankoughnet explains in his annual report for 1876 that:
>
>> The funds employed in the Indian Service, in the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, British Columbia, Manitoba and in the North West Territories are provided by Legislative appropriations, with the exception of certain insignificant amounts, in the case of some of those Provinces, which have accumulated from the sale or lease of small tracts of land, or from Timber dues. (p. 4 1876 Annual Report).
>
> While the amounts from such sales may have been insignificant, it is interesting to note that some such amounts were deposited to the credit of the Indian Funds (For examples, "Table F.", Return E(3) 1873 annual report; New Brunswick Indian Fund, Return D. p. 68, June 30, 1875; Return C(2) June 30, 1876).[114]

From the returns for the year ending June 30, 1872, it seems that, although the federal government assumed responsibility for ensuring that the medical needs of the Indians were met, it dealt with these needs as "contingencies" on a case-by-case basis as they arose. It is significant that these returns were entitled "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces."

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[114] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, pp. 39–40 (ICC Exhibit 2), emphasis in original; Return C, "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces, during the year ending 30th June, 1872, out of Upper Canada Funds"; Return E, "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces, during the year ending 30th June, 1872, out of Nova Scotia Funds"; Return E (1), "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces, during the year ending 30th June, 1872, out of New Brunswick Funds," Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 46–47, 50, and 51, respectively (ICC Documents, pp. 114–15, 117, and 116).

In the summer of 1873, Spragge issued his instructions to Indian Commissioner Provencher based on St John's recommendations arising from the promises made by Archibald and Simpson. As we have seen, those instructions included the stipulation that "[m]edicines for the sick will be provided,"[115] with regard to which the First Nation commented in its initial claim submission:

> Following Spragge's instructions of July 1873, in the fiscal year July 1, 1873 to June 30, 1874, the records of the Department for the superintendency of Manitoba and the North West Territories indicate an expenditure of $71.00 paid to A. Jackes, M.D. The following fiscal year, $227.00 was expended by the Department for medical services and medicines in Manitoba and the North West Territories. In that same year (July 1, 1874 to June 30, 1875), Provencher's report indicates that he sent a doctor to St. Peter's reserve, and would have sent one to Fort Alexander, had he heard about a measles epidemic sooner. [Frances Foley Smith notes that the figure was $527.99 for 1875–76.[116]]
>
> What is noteworthy is that these expenditures took place *before* the "revision" of Treaty One in 1875. (This took place mostly in August and September of 1875, and was not agreed to by the last band until 1876.) So we see that the Department acknowledged its obligation to provide medical care and *implemented this* before the matter of outside promises was settled in 1875.[117]

However, although the Commission concurs with the First Nation that Canada provided medical care in the interval *between* the execution of Treaty 1 in 1871 and its amendment in 1875, it also appears that medical services were delivered even *before* Treaty 1 in both Manitoba and other parts of Canada.

For its part, Canada did not consider Spragge's directive to Provencher in 1873 to have finally settled the question of medical aid. In March 1874, the Board of Indian Commissioners, established to devise a solution to the broader problem of the outside promises, issued its recommendation that, among other things, "[a] supply of simple medicines ... be provided for each Reserve, and placed in the custody of some suitable person."[118] Ultimately, as we have seen, the board's recommendations were not adopted, and, on April 22, 1875 – just five days before delivering his own recommendation that formed the basis for the amendment of Treaties 1 and 2 – the Minister of the Interior, David Laird, made $500 available immediately to deal with "contingencies," including medical aid, in a manner strikingly reminiscent of Howe's instructions to Archibald three years previously:

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[115] William Spragge, Deputy Superintendent General of Indian Affairs, to J.A.N. Provencher, Indian Commissioner, July 18, 1873, NA, RG 10, vol. 4384, no. 747, reel C7408 (ICC Documents, p. 124).

[116] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, p. 36 (ICC Exhibit 2).

[117] Roger Townshend, "Roseau River Indian Band Claim for Compensation Arising from Management of Band Funds, Specifically, Band Funds Used to Pay for Medical Care, 1909–1934" (Winnipeg: Treaty and Aboriginal Rights Research Centre of Manitoba, September 1981), p. 6 (ICC Exhibit 1). Emphasis in original.

> The sum of $500 will be placed at your disposal for such expenses (of a purely contingent nature) as you may be called on to meet: it must be distinctly understood, however, that this sum is not to be used in the payment of accounts for articles hereinbefore enumerated.
>
> You will render a statement of its expenditure quarterly, and will take care always to apply for an additional sum before that in hand is exhausted. It is considered that $2000 a year will be amply sufficient to cover every possible contingent expense and you will [illegible] not exceed the expenditure of $500 per quarter without having first obtained authority for so doing. From the funds thus placed at your disposal you will, when necessary, extend aid to indigent, sick or aged Indians, pay each small gratuities as you may be called on to give from time to time, and make such other payments as need not be referred for approval to headquarters.[119]

Medical Services after the 1875 Amendment of Treaty 1

Following the treaty amendment late in the summer of 1875, Provencher reported on the "general feeling of satisfaction and of contentment" that had come to prevail in relations between the Indians and the government. He commented on the importance of the amendment, surmising that ongoing bad feelings could have affected "the advancement of the country" and might have led to a decrease in immigration, "to which so much importance is attached." To avoid future complaints and problems, he "authorized the incurring of certain expenses to which the Government was not strictly held, but which were necessitated by the apprehensions already alluded to."[120] According to Frances Foley Smith, "[w]hile he [Provencher] did not particularize these expenses at the time, his accounts for Treaty One provisions in 1876 included payments for 'Dr. Lynch's services' and 'medical comforts.'"[121] Provencher noted that there was "no regular tariff concerning the payment of medical men," but he did not consider Lynch's charges to the government of $25 per day to be excessive "when over thirty houses are entered, over fifty persons examined, and twenty prescriptions given."[122]

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[118] Minutes of a meeting of the Board of Indian Commissioners, March 13, 1874, NA, RG 10, vol. 3608, file 3117, reel C-10105 (ICC Documents, p. 138).

[119] David Laird, Minister of the Interior, to unidentified recipient, April 22, 1875 (ICC Documents, p. 147).

In the fall of 1876, another outbreak of smallpox claimed hundreds of Indians residing on the west shore of Lake Winnipeg. Provencher reported that, had the government not taken immediate steps to implement quarantines and provide medical assistance, the toll likely would have numbered in the thousands. He added that, "[t]hough the greatest economy was used in the measures taken in that emergency, unexpected and unprovided for expenses had to be incurred, made larger still by the distances over which goods had to be transported during the winter, by the difficulties of communications that did not allow an immediate verification of the reports circulated, and by the absolute necessity of not remaining below the exigencies of the case, as the lives of hundreds depended on the proper steps being immediately taken."[123]

During the winter of 1876–77, Indian Agent H. Martineau arranged for the vaccination of those Indians on the Roseau River reserve who had not been vaccinated with the rest of the Band in 1875. In his report to Provencher on February 26, 1877, he requested that "help in the shape of provisions" be provided to some 35 band members who were "invalids and old people rendered helpless by old age and failing health."[124] Although Martineau's letter did not expressly ask for medical assistance, Provencher advised the Minister of the Interior that "provisions, ammunition and medicines" had been sent to Roseau River in accordance with Martineau's requisition.[125] Still, despite the provision of these medicines, it is apparent from a report by missionary John Scott that band members had not yet received the regular services of a doctor:

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[120] J.A.N. Provencher, Indian Commissioner, to Superintendent General of Indian Affairs, October 30, 1875, Department of Indian Affairs, Annual Report, 1875, p. 32 (ICC Documents, p. 178).

[121] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, p. 36 (ICC Exhibit 2); J.A.N. Provencher, Acting Superintendent, to unidentified recipient, June 16, 1876, NA, RG 10, vol. 3634, file 6435 (ICC Documents, pp. 188–89).

[122] J.A.N. Provencher, Acting Superintendent, to unidentified recipient, June 16, 1876, NA, RG 10, vol. 3634, file 6435 (ICC Documents, p. 192).

[123] J.A.N. Provencher, Acting Indian Superintendent, to Superintendent General of Indian Affairs, February 1, 1877 (Long Plain First Nation Inquiry, Loss of Use Claim, ICC Documents, p. 407).

> One thing I ought not forget to mention, it is the great need of a house or place in which blind, sick and infirm Indians can be cared for. Things needed by the sick they can seldom get. They have no doctor to visit them and when taken sick their case is often hopeless from want of attention, nourishment and aid. I hope that Gov[ernmen]t will give them their kind consideration.[126]

Provencher, in his new role as Acting Superintendent of the Manitoba Superintendency, agreed in a letter of November 17, 1877, to the Minister of the Interior that the Indians of Manitoba needed a more formalized system of medical assistance:

> There are now, in that Superintendency, so many Indians altogether unable to earn their life on account of sickness, old age or infirmities, and without relations to take care of them, that I believe it is necessary that the government should provide for them some more permanent system of relief.
>
> These people can hardly be admitted in the existing hospitals, because the system followed in these establishments could not conveniently accommodate them, and because they would be an unbearable source of annoyance to the other patients; moreover it is considered that your Department alone is responsible for the keeping of the Indians and for all the expenses connected with it.
>
> I have reason to believe that if only a suitable building of a cheap character, was supplied by your Department, with the quantity of provisions that must be, anyway, given to the poor, sick and needy Indians, some persons could be found to supply the necessary attendance without further expense.

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[124] H. Martineau, Indian Agent, to J.A.N. Provencher, Acting Indian Superintendent, February 26, 1877, NA, RG 10, vol. 3643, file 7777, reel C-10113 (ICC Documents, pp. 195–98).

[125] J.A.N. Provencher, Acting Indian Superintendent, to Minister of the Interior, February 26, 1877, NA, RG 10, vol. 3643, reel C-10113 (ICC Documents, pp. 195–98).

[126] John Scott, Presbyterian missionary, to unidentified recipient, March 27, 1877, DIAND, THRC file, Treaty 1, Roseau River 2 (ICC Documents, pp. 199–202).

> I have the honor to recommend this proposal to your favorable consideration, as I understand that it is not only a question of ordinary administration or policy but of humanity.[127]

It is notable that Dr Daniel Hagerty was also appointed in 1877 to implement a comprehensive program of vaccinating the Indians of the North-West Territories to prevent the spread of smallpox.[128] However, based on the record assembled for this inquiry, it seems clear that, into the late 1880s, the Indians of Roseau River's agency and other Manitoba agencies were still not receiving regular medical visits. In 1887, the Indian Agent at Clandeboye, Manitoba, advised E. McColl, Manitoba's Inspector of Indian Agencies, that "the death rate amongst the Bands is no greater than it was years ago, and now *whenever it is required a Medical man is sent to them*."[129] Two years later, in 1889, Indian Agent Francis Ogletree of the Portage la Prairie Agency explained to McColl why he had not complied with the department's requirements for vaccinating the Indians of his agency:

> [I]n reply I beg to inform you that the reasons that I did not carry out the instructions contained in the circular above referred to are as follows:
>
> 1st. The Indians who were not vaccinated were so much opposed to the function being performed on them that there was [illegible].
>
> Secondly, the birth rate was so very small among the Bands that I did not consider it advisable for me to go to the expense in recommending a Dr. to be sent when there were but so few children to vaccinate and unless the vaccination is done at the time of making the payments it will be impossible to ever get the Indians together at any other time.[130]

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[127] J.A.N. Provencher, Acting Superintendent, Manitoba Superintendency, to Minister of the Interior, November 17, 1877, NA, RG 10, vol. 3655, file [8957], reel C-10114 (ICC Documents, pp. 211–14).

[128] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, p. 37 (ICC Exhibit 2). Although Smith does not cite a primary source in support of this statement, the Commission can confirm its accuracy: L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to David Mills, Superintendent General, December 31, 1877, "Report of the Deputy Superintendent General of Indian Affairs," in *Annual Report of the Department of the Interior for the Year Ended 30th June, 1877*, 14.

[129] Indian Agent, Clandeboye, Manitoba, to E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, February 10, 1887, NA, RG 10, vol. 3771, file 34660-1 (ICC Documents, p. 224). Emphasis added.

[130] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, November 14, 1889, NA, RG 10, vol. 3851, file 76261-4, reel C-10150 (ICC Documents, pp. 227–28).

Ogletree advised McColl that 232 Indians in his agency had been vaccinated in 1885 and 1886, including three members of the Roseau River Band. He added that, "as it is considered advisable to vaccinate every seven years and as it is now nearly seven years since the Indians of my Agency have been vaccinated and if the Department sees fit to instruct me to see that the operation of vaccinating all the Indians within the limits of my Agency is carried out I will do all that is in my power to have it done, but unless it is done at the time of making the payments of annuities, it will be a useless expense to send a Dr. as very few of them can be found on the Reserves at any other time."[131] Nevertheless, the implication of the correspondence from Ogletree and his counterpart at Clandeboye is that, while physicians could be made available when circumstances required, they did not make regular visits to the reserves and some of their usual functions, such as vaccinations, were routinely carried out by the agents. In addition, a few documents provide glimpses of requests being made of various Indian agents in Manitoba and elsewhereto obtain medical assistance for Indians in need,[132] with approval being given in one Ontario case to having the costs of assistance charged back to the band.[133]

In 1892, McColl advised Deputy Superintendent General Vankoughnet that some Manitoba bands had been pressing for the services of a physician:

> Both Mr. Martineau and Mr. MacKay represented to me unofficially that the Indians had spoken to them about the necessity of a medical man being sent out to

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[131] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, November 14, 1889, NA, RG 10, vol. 3851, file 76261-4, reel C-10150 (ICC Documents, p. 229).

[132] Thomas Boshi, Chief, to R. Donnelly, Indian Agent, Port Arthur, November 1886, NA, RG 10, vol. 2359, file 72642, reel C-10104 (ICC Exhibit 4, p. 47); R. Donnelly, Indian Agent, Port Arthur, to Superintendent General of Indian Affairs, November 15, 1886, NA, RG 10, vol. 2359, file 72642, reel C-10104 (ICC Exhibit 4, p. 48); Resolution of Chippewa Council of Walpole Island, March 4, 1887, NA, RG 10, vol. 2372, file 75238, reel C-11210 (ICC Exhibit 4, p. 49); Chiefs, St Francis Indian Village, to Superintendent General of Indian Affairs, February 28, 1890, NA, RG 10, vol. 2501, file 103957, reel C-11230 (ICC Exhibit 4, p. 50); Chiefs, St Francis Indian Village, to Superintendent General of Indian Affairs, February 28, 1890, NA, RG 10, vol. 2501, file 103957, reel C-11230 (ICC Exhibit 4, p. 51); J.W. Jermyn, Indian Agent, to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, May 16, 1890, NA, RG 10, vol. 2516, file 106266, reel C-11232 (ICC Documents, p. 52); T. Walton, Indian Agent, to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, June 28, 1890, NA, RG 10, vol. 2524, file 107480, reel C-11233 (ICC Documents, p. 53).

[133] R. Donnelly, Indian Agent, Port Arthur, to Superintendent General of Indian Affairs, November 15, 1886, NA, RG 10, vol. 2359, file 72642, reel C-10104 (ICC Exhibit 4, p. 48).

> them to prescribe for their sick. There is no doubt but what these Indians are of as much need of medical treatment as those who are favored with the benefits of such officers.
>
> It appears to me that some cheaper means might be devised in supplying the Indians of Messrs. Ogletree, MacKay, Reader and Martineau with the requisite medical services than by the payment of ten dollars per day with travelling expenses. It would be less expensive to increase the salary of Dr. Orton to an amount commensurate with his services and have him to make annual visits to as many reserves as he could during the year, and then only his travelling expenses beyond his salary would be required to be paid, whereas under the present system the ten dollars a day will amount to a considerable sum more than double his present salary if he makes an annual visit to the above mentioned Indians whom I assume require his services as much as those whom he visits frequently.[134]

In a marginal note on McColl's letter, Vankoughnet remarked that the department should look into different arrangements for these agencies, including that of Francis Ogletree, the Indian Agent responsible for the Roseau River Band:

> ... if Dr. Orton should be again employed to visit Ind[ian]s outside of his district proper an arrangement must be previously made that his partner is to attend the Ind[ian]s of the latter [section] without extra charge. In the meantime it would be well to ascertain & report whether medical men living nearer to the Reserves in [Messrs.] Ogletree, Martineau and McKay's Agencies could not be employed at less expense & with greater advantage to the Indians & attend on the latter when required or to make annual visitations to the Reserve than Dr. Orton's annual visits entail.[135]

Clearly, by 1889, some arrangement was in place for Dr Orton to make occasional visits to the reserves, but the bands and their agents did not believe that this service was sufficient. The record does not disclose, however, the accounts to which such services were charged.

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[134] E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, November 14, 1889, NA, RG 10, vol. 3851, file 76261-4 (ICC Documents, pp. 230–31). The second paragraph of this quotation is from an additional page of the document which the parties did not submit with their evidence, but which the Commission has considered in this inquiry.

[135] E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, November 14, 1889, NA, RG 10, vol. 3851, file 76261-4 (ICC Documents, p. 231).

Orton visited the Roseau River reserves with McColl in 1892 and, like Ogletree in previous years, met with resistance to the government's desire to have band members vaccinated:

> My visit to medically inspect the Reserves in the Agency of Angus McKay Esq. having prevented me from going to vaccinate the Indians of the Roseau Reserve at treaty time as instructed by the Department & learning that the Indians at the Rapids had positively refused to be vaccinated by Mr. Agent Ogletree as well as that many vaccinated by him at mouth of River had failed, I decided it was my duty to visit the Reserve in company with Mr. Inspector McColl & use my best endeavors to vaccinate them all. At the mouth of the River portion of the reserve I found that only one or two of all vaccinated by Mr. Ogletree had succeeded, so I vaccinated all we could find 27 in number. I also prescribed and compounded medicines for a number of sick to their great satisfaction. We then proceeded to the reserve at the Rapids up the Roseau some 30 miles. We here found but few on the Reserve, many having gone to gather ginger root. Notwithstanding all my persuasive efforts aided by Mr. McColl, those on the Reserve refused positively to be vaccinated. The Chief had taken a determined stand on the subject & they curiously mixed up vaccination with some proposal of the Department to retract the supply of food at treaty time & some demands they made for implements [illegible] by stating that faith had not been kept with them & that they might as well die of small pox as be left without the means of making a living & starving to death.[136]

Ten years later, in a December 1902 meeting with the Roseau River Band, Indian Commissioner David Laird encouraged the surrender of a portion of the Band's reserve so that its members would have funds to acquire horses, farming implements, food, and other things "to help them to live." In the course of that meeting, Laird discovered that the Band was dissatisfied with its medical service. The primary complaint appeared to be that, although the designated doctor was a "good" one and lived close to the reserve, he would not visit when requested by band members because the Indian Agent would not authorize him to do so.[137] When Laird asked Marlatt, the

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[136] Journal and report of Dr George Orton's visit to the Roseau River Reserves, September 24–28, 1892, NA, RG 10, vol. 3851, file 76261-4 (ICC Documents, pp. 232–34).

[137] Interview between David Laird, Indian Commissioner, and Councillors Seenee (Cyril) and Szhawisgookesick (Martin Adam) of the Roseau River Band, December 23, 1902, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, pp. 62–63).

Inspector of Indian Agencies, in a letter of December 24, 1902, to determine why the doctor would not attend to sick Indians,[138] Marlatt replied on December 26, 1902:

> Regarding the Doctor not attending sick Indians, the Doctor receives $80.00 per annum for attending the two reserves, for this amount he will not visit them every time they may request, unless for extra pay, he attends to all cases at his office, which is only five miles distant from the principal reserve, he also visits the reserves when he is in the vicinity, he is very kind to them and I have had no complaints from the Indians about lack of attention, in cases where he expects extra pay I have instructed him not to go, unless instructed by Mr. Ginn, and Mr. Ginn has been instructed to send the doctor out when he considers it necessary.
>
> I would like to say for the Doctor that he has done very much for the Indians considering the remuneration received, he has had several severe surgical cases, and has been successful in treating them, Councillor Seenee forgot to tell you that he pulled himself, and son, through the typhoid fever a little over a year ago, visiting them nearly every day for three weeks.[139]

Ultimately, just over a month later, on January 30, 1903, the Band surrendered a portion of the reserve.

In the years following the surrender, proceeds from the sale of the surrendered lands were received by Indian Affairs and deposited to the credit of the Band. As Public History Inc. notes in its report prepared for this inquiry, before 1906 the proceeds were, on some occasions, deposited in trust into the Band's capital account and, on other occasions, split between the capital and interest trust accounts.[140] However, Superintendent General Frank Oliver commented in 1906 that, during the surrender negotiations, the Band had been led to understand that "a considerable amount of interest [would be] available for distribution," and it therefore became necessary to direct all interest accruals into the Band's interest account:

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[138] David Laird, Indian Commissioner, to S.R. Marlatt, Inspector of Indian Agencies, December 24, 1902, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, p. 65).

[139] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 26, 1902, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, p. 67).

[140] Public History Inc., "Roseau River First Nation Medical Aid Claim, 1902–1945: Historical Report," May 12, 1998, p. 9 (ICC Exhibit 4).

> This statement was made without knowledge of the fact that the Department of Indian Affairs has for very many years capitalized the interest on these deferred payments as well as the principal sum. This practice was doubtless adopted in what was considered the best interests of the Indians as it would tend to build their capital funds and render unnecessary the distribution of relatively large sums of interest which had been found to be of no particular benefit, and, in some respects, to be a positive detriment to the welfare of the Indians. On the other hand the building up of capital which might, from time to time, be used in permanent improvements on the reserves would better conserve the interests of those interested in the fund.... The Department now finds itself in the position of being unable to make good the statement made at the time of the surrender, and the Indians of the Rosseau [sic] River Band are, therefore, in a state of dissatisfaction and threaten to re-possess themselves of the lands, which have been sold, unless the estimated payments of interest are forthcoming. Under these circumstances, and as it appears good policy to keep faith with these Indians, the undersigned would recommend that an advance of $2,000.00 each year for the next three years during the first week in April should be distributed, per capita, to these Indians in satisfaction of the statement made in good faith by the officer who took the surrender, and that, as the normal interest on the capital invested by the ordinary usage of the Department would not produce a sufficient amount to repay this advance, that in this instance alone a division should be made between the amounts received as principal and interest on land payments and that the interest should be added to the ordinary interest or current account. As the whole amount of the land transactions amounts to $82,000.00, and as there is a balance now in the account of $4,177.94, it would appear that the proposed arrangement can be carried out.[141]

A complete record of the Band's interest account from 1902 to 1945 is set forth in the table attached as Appendix B to this report. That table shows that the revenues in the Band's interest account were relatively meagre in 1906–7 and in the preceding fiscal years, but rose sharply in 1907–8 and, with few exceptions, remained high for the years reported to 1944–45. In the words of Public History Inc., these figures demonstrate "the dramatic effect that the land sales revenue had on the account."[142] More significant for the purposes of this inquiry, however, is the fact that the federal government began to deduct from this account for medical assistance in 1909–10 and, with the exception of four years – 1915–16, 1916–17, 1920–21, and 1929–30 – continued making these deductions until 1933–34. By the Commission's tally, the deductions included $1,149.32 for medicines, drugs, and medical supplies, $2,467.36 for physicians' services, and $430.70 for hospitalization expenses and other charges. These amounts totalled $4,047.38 over the 25-year period, but the First Nation claims that, when these figures are present-valued by applying the interest rates in effect to the amounts outstanding from time to time – and subject to some minor revisions to the numbers as noted in Appendix B – the total sum owing as of March 31, 1981, was $133,078.22.[143]

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[141] Frank Oliver, Superintendent General of Indian Affairs, to Governor General in Council, February 21, 1906, NA, RG 10, vol. 3731, file 26306-2, reel C-10127 (ICC Exhibit 4, pp. 88–90).

[142] Public History Inc., "Roseau River First Nation Medical Aid Claim, 1902–1945: Historical Report," May 12, 1998, p. 10 (ICC Exhibit 4).

The record contains very little evidence regarding the provision of medical services to the Roseau River Band after 1906. A "Medical List" for 1912 indicates that Dr D.B. Houston was paid $80 per year to "attend Roseau Riv[er] Ind[ian]s," together with "$5.00 a trip for visiting Roseau Riv[er] Reserve and $10 a trip to Roseau Rapids."[144] This arrangement, as we have seen, appears to be similar to the one described by Inspector Marlatt to Indian Commissioner Laird in 1902 in the days leading up to the 1903 surrender.[145] With regard to the policy to be applied when dealing with Indian patients as opposed to non-aboriginals, the Assistant Deputy and Secretary of Indian Affairs sought the advice of O.I. Grain, the Chief Medical Officer for Indians, in 1915 inconnection with an invoice of $100 submitted by a Dr Hassard for an operation on an Indian named John Roberts:

> I beg to say that you should not lose sight of the fact that the Department does not pay for operations upon Indians at the same rate as would be charged to White people in fair circumstances. When doctors operate upon Indians they should do so upon the understanding that their charges are to be the same as is made to the poorest class of Whites. They should also bear in mind that their accounts will be promptly paid when a reasonable fee is charged. In ordinary practice they may have to take into

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[143] Roger Townshend, "Roseau River Indian Band Claim for Compensation Arising from Management of Band Funds, Specifically, Band Funds Used to Pay for Medical Care, 1909–1934" (Winnipeg: Treaty and Aboriginal Rights Research Centre of Manitoba, September 1981), pp. 10 and 40 (ICC Exhibit 1).

[144] G.M. Matheson, "Medical List," revised to October 16, 1912, NA, RG 10, vol. 997, file "Medical Lists, c. 1912," reel T-1454 (ICC Exhibit 4, pp. 110–11).

[145] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 26, 1902, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, p. 67).

> consideration the question that their accounts in some cases will not be paid, but such is not the case when they work for the Department.[146]

Similar sentiments were expressed by Indian Commissioner William Graham in 1921 regarding a suggested flat fee of $15 for "confinements": "I am aware that this is smaller than the fees usually charged by medical men when attending white women, but I think the fact that the Doctor will incur no bad debts in his practice among the Indians, providing the accounts incurred have been authorized by the Indian Agent, is sufficient reason for the payment of the fee of $15.00 suggested for confinement cases."[147]

Ultimately, as we have noted, the deductions for medical aid from Roseau River's interest account ceased in 1934, but there is no explanation why this change occurred. There is no evidence that the deductions stopped at the Band's request. During the period in which deductions were made, medical services were provided by Canada in response to appeals from the Band to alleviate the suffering of its members, but there is no evidence before the Commission to suggest that the Band ever asked to have charges for medical aid deducted from its interest account or that it even knew at the time that such deductions were being made.[148] In fact, during the community session conducted at the Roseau River reserve on July 14, 1998, elder Oliver Nelson commented that the First Nation did not discover the deductions until it conducted the background research for its 1982 claim arising out of the 1903 surrender.[149]

In the years preceding and following the 25-year period during which the government made the deductions, there is no record of any payments for medical purposes being made by or for the Band from its interest trust account. Moreover, although limited evidence of parliamentary appropriations has been placed in evidence before the Commission,[150] there is no evidence to show what portions of those appropriations, if any, were spent at Roseau River.

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[146] Assistant Deputy and Secretary to O.I. Grain, Chief Medical Officer for Indians, December 20, 1915, NA, RG 10, vol. 4076, file 451868, reel C-10127 (ICC Exhibit 4, pp. 118–19).

[147] William Graham, Indian Commissioner, to unknown recipient, in "Medical List," revised to August 1921, NA, RG 10, vol. 998, file "Medical Lists, 1921," reel T-1454-5 (ICC Exhibit 4, p. 136).

[148] As Frances Foley Smith comments, "there are no Band Fund Resolutions from the Roseau Reserve prior to the 1950's, nor do agency or superintendency records contain any information on this subject. Therefore, it cannot be established whether the band requested or consented to the medical expenditures": Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, p. 7 (ICC Exhibit 2).

[149] ICC Transcript, July 14, 1998, p. 23 (Oliver Nelson).

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[150] Public History Inc., "Roseau River First Nation Medical Aid Claim, 1902–1945: Historical Report," May 12, 1998, pp. 105 and 129 (ICC Exhibit 4); "Indian Affairs Department, Details of Revenue and Expenditure" (ICC Exhibit 2, Addendum).

PART III

ISSUES

The essence of this inquiry is whether Canada is lawfully obliged to compensate Roseau River for deducting payments for medical aid from the Band's interest account between 1909 and 1934. Although the parties have not provided the Commission with an agreed list of issues, the submissions before us can be summarized in the following four questions:

1 Did the terms of Treaty 1 include a promise to provide "medical aid" and, if so, has that promise survived the 1875 amendment to the treaty?

2 Did the deductions constitute a breach of any statutory provision by Canada?

3 Did Canada breach the terms of the 1903 surrender by deducting amounts for medical aid from the Band's interest account?

4 Did Canada induce Roseau River to rely on free medical aid to the detriment of the Band's own traditional healing methods, and, if so, does Canada owe Roseau River a lawful obligation for unilaterally withdrawing medical aid by charging medical expenses to the Band's trust account from 1909 to 1934?

We turn now to our analysis.

PART IV

ANALYSIS

Roseau River claims that Canada owes it a lawful obligation by virtue of the deductions made from the First Nation's interest account for medical aid between 1909 and 1934. Although the First Nation argues four separate bases for its claim – breach of treaty promise, breach of the *Indian Act*, breach of the terms of the 1903 surrender, and detrimental reliance – it acknowledges as a preliminary matter that, should the Commission find that the claim is valid *solely* on the basis of breach of treaty promise, an additional level of analysis will be required. Specifically, the Commission will also have to consider the *nature* and *scope* of the treaty right – that is, whether the treaty promises made by Canada's representatives included only drugs and medicines or whether the promises were sufficiently broad to include hospitalization charges and fees for doctors' services. Even if the treaty promise was a narrow one, the First Nation submits that, at the very least, it will be entitled to compensation for the costs of all drugs and medicines charged to its interest account, plus interest and costs. Alternatively, if the treaty promise was broadly framed, or if the claim can properly be upheld on one of the remaining three bases, the First Nation contends that it is entitled to be compensated for *all* the deductions made, together with interest and costs.[151]

For its part, Canada takes the position that it has always provided medical aid to aboriginal peoples as a matter of policy and that it has no lawful obligation to do so pursuant to Treaty 1. Should the Commission conclude that the treaty *did* give rise to an obligation to provide medical aid, however, Canada argues that the obligation was effectively settled by the 1875 amendment to the treaty. Ultimately, in Canada's submission, it has breached no statutory, fiduciary, or other duty, since it was authorized by statute to make deductions as it did to provide medical aid to the Band.[152]

After having invested considerable time and effort to assess the parties' submissions, the members of the present panel of the Indian Claims Commission make similar recommendations regarding the overall disposition of the claim, although we follow quite different paths to reach that end. In the view of Commissioner Bellegarde, Treaty 1 created a treaty obligation to provide medical aid; therefore, Canada's deductions from Roseau River's interest account between 1909 and 1934 were improper and give rise to an outstanding lawful obligation on Canada's part. By way of contrast, Commissioner Corcoran concludes that the deductions did not trigger any lawful obligations stemming from the treaty, the *Indian Act*, or the 1903 surrender, and did not precipitate a claim based on detrimental reliance. She finds, nonetheless, that the claim should be accepted for negotiation on the basis that, while Canada's policy may have been correctly implemented, the outcome for the Roseau River Anishinabe First Nation is unfair.

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[151] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 9–10.

[152] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 1.

The implications of this inquiry extend far beyond the circumstances of the Roseau River Anishinabe First Nation and the territorial limits of Treaty 1. As canbe seen from a paper entitled "Indian Health Care in Alberta: An Historical Study" prepared in 1979 by Treaty and Aboriginal Rights Research of the Indian Association of Alberta,[153] the question of medical aid as a treaty right has spawned an ongoing debate involving not only Canada and First Nations but also those provincial governments to which Canada has looked in later years to shoulder at least part of the burden of Indian health care. We are also aware that Saskatchewan's Office of the Treaty Commissioner has recently launched an examination of treaty rights to health benefits which will span no fewer than five treaty areas. As a panel, we believe that the subject of medical aid is worthy of a comprehensive review by both Canada and First Nations to give additional definition to the parties' intentions in the negotiation of the various treaties and in their subsequent dealings.

Be that as it may, we must address the case before us on the evidence as presented. Subject to reserving the right to reconsider our opinions in the event that a broader-ranging inquiry should disclose new information, we turn first to the reasons of Commissioner Bellegarde, followed by those of Commissioner Corcoran.

Before doing so, however, there is one final preliminary matter to be addressed. Following the hearing, but before the Commission issued this report, former Commissioner Elijah Harper, who was a member of the panel, resigned from the Commission. Although Mr Harper is no longer in a position to be able to sign this report as a member of the Commission, Commissioners Bellegarde and Corcoran wish to recognize his involvement in the extensive deliberations that went into creating this report and believe it is important to acknowledge his strong concurrence with the reasons of Commissioner Bellegarde.

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[153] Donna Gordon, Bennett McCardle, Don McMahon, and Bill Russell, "Indian Health Care in Alberta: An Historical Study" (Ottawa: Treaty and Aboriginal Rights Research (TARR) of the Indian Association of Alberta, June 1979).

REASONS OF COMMISSIONER BELLEGARDE

The Roseau River Anishinabe First Nation claims that an outstanding lawful obligation is owed to it under the terms of the Specific Claims Policy on one or more of four grounds: breach of treaty promise, breach of section 92(d) of the 1906 *Indian Act*, breach of the terms of the 1903 surrender, and detrimental reliance. By way of introduction, I do not consider it necessary to consider the issues relating to the *Indian Act* or the 1903 surrender. Because I conclude that Canada had an obligation under Treaty 1 to provide medical aid to Roseau River and the other signatories to that sacred instrument, it does not matter whether the legislation or the surrender were broad enough to permit an interpretation that would allow the deductions made by Canada from the First Nation's interest trust account between 1909 and 1934. Since medical aid was a treaty right, there was no possible basis for Canada to justify making the deductions without contravening that right. Furthermore, it is also unnecessary to consider the First Nation's arguments based on detrimental reliance, since these arguments were framed in the alternative, assuming the Commission were to conclude that medical aid did not amount to a treaty promise.

I will now elaborate on my conclusions that Canada promised medical aid under Treaty 1 and that the deductions for medical aid constituted a breach of treaty.

Breach of Treaty Promise

Did the terms of Treaty 1 include a promise to provide "medical aid" and, if so, has that promise survived the 1875 amendment to the treaty?

Treaty 1

Canada and the Roseau River Anishinabe First Nation agree that the negotiations preceding Treaty 1 spawned a great deal of confusion regarding the terms of the treaty. Where the parties differ is with respect to the legal significance of that confusion.

Roseau River initially takes the position that, although the *written* text of Treaty 1 did not include medical aid as one of its terms, the evidence indicates that medical aid *did* constitute one of the *verbal* promises made during the treaty negotiations. Elder Oliver Nelson testified at length about Canada's oral commitments as recorded by the promise keeper, Assiniwinin. In addition, counsel sets forth a number of bases on which he submits that the documentary record before us supports the conclusion that medical aid was a treaty promise:

- The Prince affidavit, coming so soon after the parties had signed Treaty 1 and being sworn subject to the penal consequences associated with preparing a false affidavit, demonstrates the Indian understanding that the treaty promises included "medicines for the sick."[154] In counsel's view, given Lieutenant Governor Archibald's comments regarding the "astonishing accuracy" of the Indians' recollections[155] and Indian Agent Molyneux St John's statement regarding the consistency of those recollections from band to band,[156] nothing in the record of this inquiry carries the weight of this affidavit, and in such circumstances a judge would be compelled to accept that evidence.[157]

- St John acknowledged that "[the] Treaty was signed, the Commissioner meaning one thing, the Indians another."[158] Given this fact, principles of treaty interpretation – in particular, the decision of the Supreme Court of Canada in *R. v. Sioui*[159] – direct the Commission, in the First Nation's submission, to construe the treaty not according to the technical meaning of its words but in the sense that it would be naturally understood by the Indians.[160] Counsel argues that such an interpretation would permit the Commission to conclude that the promise of medical aid amounted to a term of the treaty, notwithstanding that the promise existed outside the scope of the treaty document, because that document recorded merely a *part* of the treaty.[161] Since it was the function of Indian Commissioner Wemyss Simpson to record the content of the treaty, the responsibility for the confusion should rest, according to the First Nation, at the feet of Simpson and Canada.[162]

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[154] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 37 and 50; ICC Transcript, March 25, 1999, p. 35 (Rhys Jones).

[155] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 12, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 1 (ICC Documents, p. 67).

[156] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 11–12 (ICC Documents, p. 103).

[157] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 50; ICC Transcript, March 25, 1999, pp. 35–36 (Rhys Jones).

[158] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 11–12 (ICC Documents, pp. 102–3).

[159] *R. v. Sioui*, [1990] 1 SCR 1025.

[160] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 37–38.

- Although St John in his letter of March 1, 1873, could not *recall* a promise of medical aid being made during the Treaty 1 negotiations and claimed to "have never heard the subject mentioned" until he received Joseph Howe's letter of February 8, 1873,[163] counsel for the First Nation notes that St John did not *deny* that such a promise had been made.[164] Indeed, to the contrary, counsel suggests that St John's statement was inconsistent with the earlier Prince affidavit.[165] Similarly, in the First Nation's 1981 submission, Roger Townshend argued that, in making this statement, St John contradicted his own letter of February 24, 1873 – just five days previously – in which he described the demands of the Pembina bands for "(among other things) medical care, as arising from the promises made at the treaty."[166] Moreover, counsel contends that St John's particularization of the treaty promises must have included medical aid, since Deputy Superintendent Spragge later noted that, as the government intended to comply with St John's recommendation, "[a]ccordingly, the following may be purchased and delivered when the parties are prepared to receive them:... Medicines for the sick will be provided."[167]

- Given in the wake of input from Simpson, St John, and the deponents of the Prince affidavit, Spragge's direction to Provencher to provide "medicines for the sick" is, in the First Nation's submission, the most critical piece of evidence in support of the conclusion that Spragge himself must have considered medical aid to constitute one of the treaty promises.[168] According to counsel, there was nothing in Spragge's letter to suggest that medical aid was something new, provided simply as a matter of the government's benevolence or policy, while other matters – such as animals and implements, which formed the context for Spragge's direction to provide medical aid – comprised treaty promises.[169]

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[161] ICC Transcript, March 25, 1999, p. 28 (Rhys Jones).

[162] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 38; ICC Transcript, March 25, 1999, p. 29 (Rhys Jones).

[163] Molyneux St John, Indian Agent, to Joseph Howe, Secretary of State for the Provinces, March 1, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 9 (ICC Documents, p. 108).

[164] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 44.

[165] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 44.

[166] Roger Townshend, "Roseau River Indian Band Claim for Compensation Arising from Management of Band Funds, Specifically, Band Funds Used to Pay for Medical Care, 1909–1934" (Winnipeg: Treaty and Aboriginal Rights Research Centre of Manitoba, September 1981), p. 5 (ICC Exhibit 1).

[167] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 39.

[168] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 36–37, 44, and 50; ICC Transcript, March 25, 1999, p. 20 (Rhys Jones).

- Roseau River considers the inquiry by the Board of Commissioners in 1874 as the best, if not the only, real opportunity to reconcile the differing views regarding the nature and extent of the outside promises, given that the participants in the treaty-making process remained alive and well and were accessible to the board.[170] The findings of that board, in counsel's submission, although not recognizing the promises as claimed in their entirety, nevertheless support the conclusion that promises *were* made outside the scope of the written treaty and that *some* of those promises, such as a supply of simple medicines, should be provided to resolve Indian discontent.[171] The board's findings also confirmed Spragge's instruction that medical assistance amounted to a treaty promise. Therefore, according to counsel, the Commission should afford those findings considerable weight and, like an appellate court, should be reluctant to disturb those findings and to substitute its own conclusions.[172]

- Nevertheless, the First Nation argues that the findings of the Board of Commissioners constituted mere recommendations, had no legal effect, and were irrelevant in any event because, by the time the board convened, Spragge had already issued his directive to Provencher to provide medical aid. Therefore, by 1873, Canada had acknowledged a treaty right to medical aid and that treaty right was being implemented: in counsel's words, "as a matter of law, medical aid is already an acknowledged right pursuant to Treaty #1 and is no longer 'outside'."[173]

Once it is accepted that a promise of medical aid had been made, the First Nation submits that the promise was enforceable from that point forward and could not be extinguished, surrendered, or waived except in accordance with principles of law relating to the termination of treaty rights.[174] Furthermore, once it is conceded that Roseau River had a treaty right to medical aid, then "as a matter of logic" it became improper for Canada to use a statutory authority – if such an authority existed at all – to make deductions for medical aid from the First Nation's trust account.[175]

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[169] ICC Transcript, March 25, 1999, pp. 22 and 27 (Rhys Jones).

[170] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 40; ICC Transcript, March 25, 1999, pp. 25–26 (Rhys Jones).

[171] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 41.

[172] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 40–42 and 44; ICC Transcript, March 25, 1999, pp. 25–26 (Rhys Jones).

[173] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 36–37, 40–41, and 43.

[174] ICC Transcript, March 25, 1999, p. 138 (Rhys Jones).

For its part, Canada contends that Treaty 1 on its face is silent on the question of medical aid, although counsel acknowledges the confusion surrounding the outside promises.[176] However, Canada submits that the confusion does not arise simply by virtue of one party advocating that medical aid was an outside promise and the other denying it; rather, there were differences *within* the two camps themselves.[177] For example, although the Prince affidavit clearly makes reference to medical aid, it is contradicted, in Canada's view, by Prince's earlier account of the treaty negotiations – signed by "four of the seven Chiefs who were parties to the Treaty" – that makes no mention of medical aid.[178] Canada cites other instances as well:

> Aside from the affidavit, numerous other complaints of unfulfilled "outside promises" or requests for aid were made during the period of 1872–1875 by Dr. Schultz, a medical practitioner who treated the Indians, Reverend Henry Cochrane, who was present at treaty, the Chiefs of the area in petitions requesting aid, and the Chief of the Roseau River Band at a meeting with the Minister of the Interior. None of these complaints or requests for aid claimed any treaty obligation to provide medical aid. The only reference to medical aid was contained in the letter from Rev. Henry Cochrane who requested medical aid but did not claim the request was a treaty obligation, in contrast to the request he made in the same letter for a school which he did relate to the treaty.[179]

Although the First Nation submits that St John's reports were inconsistent and thus unreliable, Canada argues that "[a] more plausible explanation is that St. John never heard of the demand for medical aid being tied to a treaty obligation, which is consistent with what he told the

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[175] ICC Transcript, March 25, 1999, p. 140 (Rhys Jones).

[176] ICC Transcript, March 25, 1999, p. 79 (Robert Winogron).

[177] ICC Transcript, March 25, 1999, pp. 81 and 85 (Robert Winogron).

[178] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 12.

[179] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 12.

Indians at the time of their demand."[180] Moreover, the recommendation by St John on which Spragge based his direction to Provencher in March 1873 has never been found, and Canada suggests that it is unlikely, given St John's earlier statements, that he would have recommended supplying medical aid in fulfilment of a treaty obligation.[181]

As for Spragge's letter, counsel for Canada argues that key portions of the document are illegible and unclear, and that, contrary to the First Nation's position, the document does not resolve the issue of medical aid or even constitute evidence that the Crown confirmed medical aid as a treaty promise.[182] In particular, although the letter states that "St. John particularized the presents which *it was understood* that Governor Archibald & Commr. Simpson had promised should be given,"[183] Canada suggests that it is not explicit who had that understanding:

> Certainly, it was understood by the Indians, or at least there is some evidence of it, that medical aid was promised. It was certainly the position of some Crown officials that medical aid was not promised. St. John himself in a letter said that medical assistance is not a treaty promise and that the Indians will have to care for their own sick.[184]

Canada further disputes the First Nation's contention that, by 1873, as a result of Spragge's letter, medical aid had ceased to be an outside promise. In counsel's submission, when the Board of Commissioners met in 1874, its members did not admit to any of the "promises" dealt with in their recommendation, but rather considered medical aid to remain an unresolved issue and, being beyond the scope of the written treaty, an outside promise, if indeed it was promised at all. The board's report merely recommended a solution to the problem, but the outside promises remained unsettled until the amendment of Treaty 1 in 1875.[185] Canada submits that its supply of medical services before 1875 reflected government policy, based on the provisions of the *Indian Act*, rather than an acknowledgment of a treaty obligation, since the evidence discloses government appropriations to quell a smallpox outbreak even before Treaty 1 was signed.[186] Counsel summarizes the policy in these terms:

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[180] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 12.

[181] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 13.

[182] ICC Transcript, March 25, 1999, pp. 85 and 87–88 (Robert Winogron).

[183] William Spragge, Deputy Superintendent General of Indian Affairs, to J.A.N. Provencher, Indian Commissioner, July 18, 1873, NA, RG 10, vol. 747, reel C7408 (ICC Documents, pp. 123–25). Emphasis added.

[184] ICC Transcript, March 25, 1999, p. 87 (Robert Winogron).

> The [statutory] provision was that where sick or disabled Indians were not provided for by the band of which they were members, the Superintendent General could furnish sufficient aid from the funds of the band for the relief of such sick or disabled Indians. The legislative scheme and administrative policy was that the Indian bands were to be primarily responsible for their own sick. If a band did not provide for its sick the department would provide assistance and, if possible, the cost of such assistance would be charged to the band. If not, appropriations would be made from general government revenue.[187]

In my view, the question of whether there was a treaty promise of medical aid stands or falls on the events of 1871, and the circumstances between 1871 and 1875 do not serve to change the nature of that promise. It is important to have careful regard for the historical context, therefore, as well as the specific events giving rise to Treaty 1, to allow a precise identification of the nature and extent of the treaty promise of medical aid made in 1871.

At the outset, I acknowledge that there is documentary evidence both *supporting* and *opposing* medical aid as a treaty promise. Without more, I might feel uncomfortable siding with Roseau River in concluding without reservation that an obligation to provide medical aid arose under Treaty 1, but I would be equally troubled in positively deciding, as Canada proposes, that a treaty right to medical aid was not contemplated or created.

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[185] ICC Transcript, March 25, 1999, pp. 88–89 and 91 (Robert Winogron).

[186] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 13; ICC Transcript, March 25, 1999, p. 100 (Robert Winogron).

[187] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 13. Several statements of this policy, ranging from 1888 to 1968, are set forth in Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, pp. 40–42 (ICC Exhibit 2), and reproduced in the reasons of Commissioner Corcoran at pages 177–80 of this report.

I believe, however, that the recollections of Roseau River's "promise keeper," Assiniwinin, as passed on to the Commission through Oliver Nelson, have the effect of breaking the deadlock in the documentary evidence. In considering this evidence, I have given careful regard to a number of cases in which the courts have been called on to consider the admissibility and weight to be accorded to the oral histories of First Nations. In 1981, MacKinnon JA of the Ontario Court of Appeal stated in *R. v. Taylor and Williams*:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.[188]

Four years later, in *Simon v. The Queen*, former Chief Justice Dickson concluded, based on oral history, that the appellant Simon was a descendant of the Mi'kmaq (Micmac) Indians who had been party to the Treaty of 1752. In overruling the decision of the Nova Scotia Supreme Court, Appellate Division, Dickson CJ wrote:

> In my view, the appellant has established a sufficient connection with the Indian band, signatories to the Treaty of 1752. As noted earlier, this Treaty was signed by Major Jean Baptiste Cope, Chief of the Shubenacadie Micmac tribe, and three other members and delegates of the tribe. The Micmac signatories were described as inhabiting the eastern coast of Nova Scotia. The appellant admitted at trial that he was a registered Indian under the *Indian Act*, and was "an adult member of the Shubenacadie-Indian Brook Band of Micmac Indians and was a member of the Shubenacadie Band Number 02." The appellant is, therefore, a Shubenacadie-Micmac Indian, living in the same area as the original Micmac Indian tribe, party to the Treaty of 1752.
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> This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep

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[188] *R. v. Taylor and Williams* (1982), 34 OR (2d) 360 at 364 (Ont. CA), MacKinnon JA.

> written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.[189]

The succeeding Chief Justice, Lamer CJ, offered the following comments in *R. v. Van der Peet* on the manner in which the courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[190]

Lamer CJ later expanded on these reasons in *Delgamuukw v. British Columbia*:

> [A]lthough the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure".... Both the principles laid down in *Van der Peet* – first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit – must be understood against this background....
>
> This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal

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[189] *Simon v. The Queen*, [1985] 2 SCR 387 at 407–8. Emphasis in original.

[190] *R. v. Van der Peet*, [1996] 2 SCR 507 at 558–59, Lamer CJ.

> rights recognized and affirmed by s. 35(1) [of the *Constitution Act, 1982*] are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights....
>
> Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of [that] culture": Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations." The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.
>
> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[191]

More recently, these principles have found expression in the majority reasons of Binnie J in *R. v. Marshall*:

> The trial judge's view that the treaty obligations are all found within the four corners of the March 10, 1760 document, albeit generously interpreted, erred in law by failing to give adequate weight to the concerns and perspective of the Mi'kmaq

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[191] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1066–69, Lamer CJ.

> people, despite the recorded history of the negotiations, and by giving excessive weight to the concerns and perspective of the British, who held the pen. (See *Badger*, at para. 41, and *Sioui*, at p. 1036.) The need to give balanced weight to the aboriginal perspective is equally applied in aboriginal rights cases: *Van der Peet*, at paras. 49–50; *Delgamuukw*, at para. 81.
>
> While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the March 10, 1760 document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people, a principle emphasized in the treaty context by *Simon*, at p. 408, and *Badger*, at para. 4, and in the aboriginal rights context in *Van der Peet*, at para. 68, and *Delgamuukw*, at paras. 80–82. The trial judge interrogated himself on the scope of the March 10, 1760 text. He thus asked himself the wrong question. His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different.[192]

The present case is much like *Simon* in that the claimant is unable to offer *direct* proof of the question at the heart of the inquiry. There are admittedly no treaty documents to establish medical aid as a promise as of 1871. There is clear evidence, however, that Canada's own representatives were prepared to concede that the written form of Treaty 1 submitted to Ottawa for approval by Order in Council in September of 1871 was incomplete. This evidence must be considered in the context of Oliver Nelson's evidence regarding the role of the "promise keeper" in the meetings with Lieutenant Governor Archibald and Commissioner Simpson. As Lamer CJ stated in *Delgamuukw*, it is a long-standing practice in the interpretation of treaties between Canada and aboriginal peoples that this sort of oral evidence should be "accommodated and placed on an equal footing" with the documentary evidence before us.

As we have seen, Assiniwinin was specially chosen by Roseau River's leaders to preserve the promises made during the treaty negotiations, and one of those promises was "medicines for the sick." The vividness of Nelson's stories of the promise keeper pounding on the table at treaty time to remind Canada's representatives of the obligations theyhad incurred in 1871 remains with me. Those stories serve to corroborate and underscore the claim to aid for their sick people made by the Pembina bands to Indian Agent Molyneux St John on September 6, 1872, and, in particular, the later statement by members of the St Peter's Band in the Prince affidavit – a sworn document attracting serious consequences if falsely declared – that they were entitled to, "on each reserve, medical aid." Nothing in Canada's case directly challenges the memories of Assiniwinin, and it is worth repeating Lieutenant Governor Archibald's words in marvelling at the Indians' recollections of their negotiations:

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[192] *R. v. Marshall*, [1999] 3 SCR 456 at 478–79, Binnie J.

> It is impossible to be too particular in carrying out the terms of the arrangements made with these people. *They recollect with astonishing accuracy every stipulation made at the treaty*, and if we expect our relations with them, to be of the kind, which it is desirable to maintain, we must fulfil our obligations with scrupulous fidelity.[193]

Is it appropriate to give effect to verbal promises in the face of a written treaty document in which no mention of medical assistance is made? Perhaps the most relevant consideration of this issue for the purposes of the present inquiry can be found in the Commission's discussion of the Pottawatomi rights claim of the Moose Deer Point First Nation.[194] In that case, the essential question was whether promises regarding presents, land, and equality made to a council of 75 principal chiefs on Manitoulin Island by Samuel Peters Jarvis, the Chief Superintendent of Indian Affairs, on behalf of Lieutenant Governor Sir Francis Bond Head, constituted a treaty. In the present case, unlike the Moose Deer Point inquiry, there is no doubt that a treaty*exists*, since the parties do not dispute that they had the capacity to treat, they intended to create obligations, they were engaged in proceedings that involved a measure of solemnity, and, in fact, they created mutually binding obligations. The real question is the *extent* of Canada's obligation under the treaty. Nevertheless, much of the reasoning in the Moose Deer Point report relating to the existence and force of oral treaty terms applies equally in this inquiry.

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[193] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, to Joseph Howe, Secretary of State for the Provinces, February 12, 1872, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," p. 1 (ICC Documents, p. 67). Emphasis added.

[194] Indian Claims Commission, *Moose Deer Point First Nation Inquiry: Pottawatomi Rights* (Ottawa, March 1999), reported (1999) 11 ICCP 135.

In that report we found that the courts have repeatedly referred to the *sui generis* nature of treaties, and the unique circumstances that surround them, at times implying that an oral agreement might well constitute a treaty or part of a treaty. In *R. v. Badger*,[195] for example, Cory J in the Supreme Court of Canada held that "*treaties*, as written documents, *recorded an agreement that had already been reached orally* and they did not always record the full extent of the oral agreement."[196] In a separate concurring judgment, Sopinka J (Lamer CJ concurring) stated: "[T]he principles ... [of treaty interpretation] arise out of the nature of the relationship between the Crown and aboriginal peoples[,] with the result that *whatever the document in which that relationship has been articulated*, the principles should apply to the interpretation of that document."[197] In other words, the principles of treaty interpretation will apply to any document articulating the relationship between the Crown and Indian peoples. Based on Justice Cory's words, the agreement exists *before* being recorded in written form; presumably, such an agreement, once formed, can *continue* to exist even if the parties fail in whole or in part to reduce it to writing, but instead record some or all of it by other means. If, in fact, the defining feature of a treaty is the *substance of the relationship* between the Crown and aboriginal peoples, rather than the *nature of the medium* in which that relationship is articulated, then, provided the requisite conditions of treaty making are met, there would seem to be nothing to preclude any instrument that records that relationship from being properly construed as a treaty, whatever form that instrument may take.

Another significant case on this point is *R. v. Côté*, in which Baudouin JA of the Quebec Court of Appeal stated:

> Concerning the proof of such treaties, the situation in aboriginal law is different from what we usually encounter. *In the first place, a number of these agreements were not always reduced to writing and, in many cases, the common aboriginal custom was*

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[195] *R. v. Badger*, [1996] 1 SCR 771.

[196] *R. v. Badger*, [1996] 1 SCR 771 at 798, Cory J. Emphasis added.

[197] *R. v. Badger*, [1996] 1 SCR 771 at 782, Sopinka J. Emphasis added.

> *to acknowledge their existence through a mere exchange of wampum and to commit them to the collective memory*. Furthermore, the colonizer was in most cases in a position of superiority, if only because the legal concepts used were in some cases unknown to the aboriginal people or hard to understand or grasp in their cultures. That is why the Supreme Court has established some exceptional but nevertheless precise rules in such matters, rules that are binding on the lower courts.
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> The first such rule is that *any agreement made in principle be considered to be a true treaty even if it does not have the form of one*, notwithstanding some reluctance on the part of some lower courts: see *Delgamuukw v. British Columbia, supra*. *Thus any pact, alliance, agreement or arrangement may constitute a treaty* within the meaning of s. 88 of the *Indian Act*: *R. v. Simon, supra*; *R. v. Sioui, supra*, at p. 441 *et seq*. As Lamer J. wrote, in *Sioui* (at p. 441): "... what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."...
>
> The second such rule is that *it is sometimes necessary, in the absence of a written text acknowledging the agreement, to be content with secondary evidence, of lesser quality*, hearsay evidence, and thus to derogate consciously from the ordinary rules.[198]

It seems beyond question at this point that a treaty may exist either wholly or in part in the absence of a written instrument documenting the understandings reached by the parties in negotiating the agreement between them. In the present inquiry, these authoritiesmean that it is open to me to conclude that the outside promises formed *part* of Canada's treaty obligation to Roseau River and the other signatory bands of Treaties 1 and 2. In fairness to Canada, it should be noted that the Crown's representatives recognized at an early date that the government's obligations constituted more than just the written form of Treaty 1 adopted by Order in Council on September 12, 1871.

To those who might argue that the combined effect of the documentary evidence and the promise keeper's recollections still does not lead unequivocally to a finding that medical aid constituted an oral promise under Treaty 1, I still believe that principles of treaty interpretation direct me to such a conclusion in any event.

Having regard for the language barriers and the disparity in bargaining power that existed between the Crown and aboriginal peoples at the time of the treaty negotiations, the courts have expressed a willingness to go beyond the strict rules of interpretation developed in contract law to determine the legal effect of Indian treaties. In*Badger*, for example, Cory J held that uncertain treaty terms should be interpreted generously in favour of First Nations. He formulated several bases for this conclusion:

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[198] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46–47 (Que. CA), Baudouin JA. Emphasis added.

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow*, *supra*, at pp. 1107–8 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142–43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See*Simon*, *supra*, at p. 406; *Sioui*, *supra*, at p. 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404.[199]

Later in the same judgment, in applying the foregoing principles, Cory J added:

> [W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing.... The treaties were drafted in English and by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, *it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.* This

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[199] *R. v. Badger*, [1996] 1 SCR 771 at 793–94, Cory J.

> applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick, supra*, at p. 36; *Sioui, supra*, at pp. 1035–36 and 1044; *Sparrow, supra*, acting p. 1107; and *Mitchell, supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.[200]

In *Sioui*, Lamer J set forth the basis for these conclusions, which, in his view, are rooted in the historical relationship of the Crown and the Indians:

> Finally, once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction. This principle, for which there is ample precedent, was recently reaffirmed in *Simon*. The factors underlying this rule were eloquently stated in *Jones v. Meehan*, 175 U.S. 1 (1899), a judgment of the United States Supreme Court, and are I think just as relevant to questions involving the existence of a treaty and the capacity of the parties as they are to the interpretation of a treaty (at pp. 10–11):
>
>> In construing any treaty between the United States and an Indian tribe, it must always ... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[201]

In *R. v. Van der Peet*, Lamer CJC was more explicit in attributing the generous interpretation of Indian treaties to the existence of the fiduciary relationship between the Crown and the Indians:

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[200] *R. v. Badger*, [1996] 1 SCR 771 at 798–99, Cory J. Emphasis added.

[201] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035–36, Lamer J.

> *General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown*
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> Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favor of aboriginal peoples:
>
>> When the purposes of the affirmation of aboriginal rights are considered, *it is clear that generous, liberal interpretation of the words in the constitutional provision is commanded.* [Emphasis added.]
>
> This interpretive principle, articulated first in the context of treaty rights – *Simon v. The Queen*, [1985] 2 S.C.R. 387 at p. 402, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390 (S.C.C.); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 36, 144 D.L.R. (3d) 193 (S.C.C.); *R. v. Horseman*, [1990] 1 S.C.R. 901 at p. 907, 55 C.C.C. (3d) 353 (S.C.C.); *R. v. Sioui*, [1990] 1 S.C.R. 1025 at p. 1066, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427 (S.C.C.) – arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267 at p. 279, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 (S.C.C.).[202]

As for interpreting the treaty's meaning and the nature of the rights flowing from it, the Supreme Court of Canada in *Sioui*, relying on the reasons of MacKinnon JA in *R. v. Taylor and Williams*, held that the broader historical context of a treaty is always a relevant line of inquiry. Similarly, other recent judgments of the Supreme Court of Canada have also concluded that such evidence is both relevant and admissible as an aid to interpretation of a treaty. In *Mitchell v. Peguis Indian Band*, after quoting from the *Nowegijick* case, Dickson CJ commented:

> Two elements of liberal interpretation can be found in this passage: (1) ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians, and (2) aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred to more legalistic and technical

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[202] *R. v. Van der Peet* (1996), 137 DLR (4th) 289 at 301–2 (SCC), Lamer CJ.

> constructions. *In some cases, the two elements are indistinguishable, but in other cases the interpreter will only be able to perceive that there is an ambiguity by first invoking the second element.*[203]

In other words, Dickson CJ recognized that in some cases the plain and ordinary meaning of a clause in an Indian treaty might reflect the true understanding and intentions of both the Crown and the First Nation, but in other cases a seemingly clear and unambiguous treaty provision might be entirely inconsistent with the true intentions of the parties. Therefore, a treaty interpretation that considers only the written terms of the treaty on its face might lead to unfairness if evidence of the broad historical context confirms that the aboriginal understanding of the treaty differed substantially from what government officials set out in the written treaty.

A strict application of the parol evidence rule[204] in such cases could frustrate the ability of the courts to give legal effect to the true intentions of the parties because the understanding of aboriginal people can sometimes only be ascertained by examining evidence of the broad historical context leading up to the signing of the treaty. Therefore, when a First Nation asserts that the written terms of the treaty do not properly reflect the true understanding and intentions of the parties at the time the treaty was executed, it becomes useful to consider the oral discussions between representatives of the Crown and the First Nation and other extrinsic evidence relevant to the interpretation of the clause in question.

This interpretive approach has recently been endorsed by the Supreme Court of Canada in *R. v. Marshall*. Binnie J, writing for the majority, rejected on three grounds the application of the parol evidence rule and the "narrow approach" to treaty interpretation:

> Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Rules of

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[203] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 98, Dickson CJ. Emphasis added.

[204] "Parol evidence" is essentially oral or verbal evidence, given by word of mouth, but, as a rule – known as the "parol evidence rule" – "parol evidence is not admissible to contradict or vary or add to or subtract from a written document": *The Canadian Law Dictionary* (Toronto: Law and Business Publications, 1980), 276. "This evidence rule seeks to preserve [the] integrity of written documents by refusing to permit contracting parties to attempt to alter [the] import of their contract through use of contemporaneous oral declarations": *Black's Law Dictionary*, 5th ed. (St Paul, Minn.: West Publishing Co., 1979), 1006.

interpretation in contract law are in general more strict than those applicable to treaties, yet Professor Waddams states in *The Law of Contracts* (3rd ed. 1993), at para. 316:

> The parol evidence rule does not purport to exclude evidence designed to show whether or not the agreement has been "reduced to writing", or whether it was, or was not, the intention of the parties that it should be the exclusive record of their agreement. Proof of this question is a pre-condition to the operation of the rule, and all relevant evidence is admissible on it. This is the view taken by Corbin and other writers, and followed in the Second Restatement.

See also *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167, *per* Idington J., at p. 191, and G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 177. For an example of a treaty only partly reduced to writing, see *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) (leave to appeal dismissed, [1981] 2 S.C.R. xi).

Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received *even absent any ambiguity on the face of the treaty*. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams, supra*, at p. 236:

> ... if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The proposition is cited with approval in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 87, and *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1045.

Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, *per* Dickson J. (as he then was) in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Dickson J. stated for the majority, at p. 388:

> Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.

> The *Guerin* case is a strong authority in this respect because the surrender there could only be accepted by the Governor in Council, who was not made aware of any oral terms. The surrender could *not* have been accepted by the departmental officials who were present when the Musqueam made known their conditions. Nevertheless, the Governor in Council was held bound by the oral terms which "the Band understood would be embodied in the lease."[205]

To assist the Commission in determining whether the parties to Treaty 1 intended to include medical aid as one of its provisions, Canada and the Roseau River Anishinabe First Nation have tendered extrinsic evidence relating to the historical context of the period, the specific circumstances associated with the negotiation and implementation of Treaty 1, and the subsequent conduct of the parties. From this evidence, it can be seen that the treaty arose out of the creation of the province of Manitoba in the context of Canada's desire to open up new areas of population growth and economic development. With the arrival of the fur trade and the later influx of European settlers, however, came the decimation of the buffalo as the staple of prairie Indian subsistence and the introduction of new diseases that claimed many aboriginal lives. Indeed, in the days preceding Treaty 1, negotiations at the North-West Angle were suspended, in part to allow the Indians of what became the Treaty 3 area to disperse to minimize the effects of a serious smallpox outbreak. It is clear from the historical record that the negotiation of Treaty 1 took place in the immediate aftermath of the epidemic, and it is reasonable to assume that the Indian negotiators would have been concerned with matters of disease and medical care in the course of striking their bargain.

Within a few short months following the treaty's consummation, the Pembina bands appeared before Molyneux St John, claiming medical assistance as a treaty promise, and the St Peter's Band delivered the Prince affidavit, seeking "medical aid" on the same grounds. Moreover, Deputy Superintendent Spragge noted on July 18, 1873, that "St. John particularized the presents which it was understood that Governor Archibald & Commr. Simpson had promised should be given," and, in accordance with the recommendation set forth in St John's letter, Spragge directed Indian Commissioner Provencher to provide "[m]edicines for the sick."

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[205] *R. v. Marshall*, [1999] 3 SCR 456 at 471–73, Binnie J.

Similarly, it will be recalled that, in seeking an end to the dispute over the outside promises, the Board of Indian Commissioners acknowledged, on March 13, 1874, while being careful not to recognize the alleged promises "in their entirety," that "there were some promises made which were not included in the Treaty." Accordingly, the board recommended that the Crown provide the Indian parties to the treaty with, among other things, "[a] supply of simple medicines ... for each Reserve ... placed in the custody of some suitable person."

I find it difficult to conceive that Spragge or the Board of Indian Commissioners would have *volunteered* medical aid as a means of resolving the outside promises if there had not been some understanding that medical aid was already on the table in some shape or form. It is reasonable to assume that Canada would have sought to *limit* its liability, not further extend itself by taking on *additional* obligations that had not previously been discussed. I consider these points to be consistent with Roseau River's view of the case.

On the basis of all the evidence, and in particular the approaches made by the Pembina Indians and the St Peter's Band, I have no doubt that the members of those bands understood medical aid in some form or other to have been included among the terms of Treaty 1. Accordingly, when Treaty 1 is interpreted not in its strict technical sense or subject to the rigid modern rules of construction, but in the sense that the Indians clearly understood it at the time of signing, a right to medical aid represents a realistic interpretation of the treaty. Even if it might be said that there is some question whether such a promise would have expressed the "common intention" of the parties, to use the words of Lamer J in *R. v. Sioui*,[206] it is my view that, as Cory J later wrote in *R. v. Badger*,[207] the treaty provisions must be interpreted generously, with ambiguities or doubtful expressions resolved in favour of the Indians.

In the result, I find that the documentary record regarding medical aid corroborates the recollections of Assiniwinin. It is also my view, based on principles of treaty interpretation, that construing the treaty as it would naturally have been understood by the Indians at the time of signing supports the same conclusion: that medical aid should be considered to have been a treaty right following the execution of Treaty 1 in 1871.

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[206] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069.

[207] *R. v. Badger*, [1996] 1 SCR 771 at 793–94, Cory J.

The 1875 Amendment of Treaty 1

The parties to this inquiry attach quite different interpretations to the fact that the 1875 amendment made no express reference to medical aid.

Roseau River concedes that the Indian signatories took the benefit of the increase in annuities from $3 to $5 per person contemplated by the 1875 amendment, so the amendment cannot be treated as void.[208] Nevertheless, the First Nation contends that, as a result of Spragge's letter of July 18, 1873, medical aid ceased to be a mere "outside promise" and became "a fully recognized and implemented treaty right."[209] As a result, medical aid was not even contemplated by the term in the 1875 amendment by which the Indians were "held to abandon all claim whatever against the Government in connection with the so-called 'outside promises' other than those contained in the memorandum [of outside promises] attached to the Treaty."[210] Moreover, the fact that the treaty right to medical aid had already been implemented by 1875 creates, in the First Nation's view, an ambiguity, or at least raises doubt about the effect of the amendment. In such circumstances, counsel submits that it is appropriate to construe the amendment *contra proferentem* – that is, against the interest of the party who drew the document.[211]

Perhaps more significant, the First Nation contends that, given the ambiguity in the treaty amendment, it would not be fair or reasonable to attribute to the Roseau River Band in 1875 the intention that the waiver in the amendment should apply to the implemented treaty right of medical assistance, nor in counsel's view is there any evidence to support such a conclusion.[212] Because the Band had no independent representation, it fell to Canada as a fiduciary, according to counsel, to ensure that band members were fully informed of what they were giving up to acquire the $2 increase in annuities. Since Canada failed to do so, and in clear language, "it could not then be fairly said that the Indians knew when they signed [the amendment] that their right to medical aid under the Treaty was being extinguished."[213] Ultimately, the First Nation submits that it would be unconscionable for Canada to claim that the treaty right to medical aid was waived by the 1875 amendment, given

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[208] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 42 and 45.

[209] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 46–47.

[210] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 46–47; Order in Council, April 30, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 161–64).

[211] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 46.

- the disparity in bargaining power between the Crown and the Indians resulting from the unfamiliarity of the latter with the English language and the Crown's failure to have the amendment translated into Ojibway, as it had done with Treaty 1;
- the absence of proof that the Indians were informed of the specific promises the Crown would claim were being waived; and
- the "severe disparity between the $2.00 increase in annuity on the one hand and the other benefits purportedly being waived."[214]

Accordingly, the onus resides with Canada as the party seeking to enforce the 1875 amendment to demonstrate that the bargain was, in the circumstances, fair, just, and reasonable – an onus Canada is unable to meet, in the First Nation's view, since the Crown was arguably already obliged to perform the majority of the treaty promises referred to in the memorandum of outside promises.[215] This means that the amendment must be "read down" to waive only those promises that the Indians would have understood to have been waived "and not ... other promises not expressly contained in the 'memorandum' [of outside promises]."[216] In the result, assuming that a treaty right to medical assistance existed and was not waived, surrendered, or extinguished by the 1875 amendment, the

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[212] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 47.

[213] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 53.

[214] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 53–54.

[215] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 54.

[216] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 55.

First Nation takes the position that the right continued to exist after 1875, thereby rendering the deductions from the Band's interest account improper.[217]

In response, Canada agrees with the First Nation's statement that the 1875 amendment was effective, but, unlike the First Nation, it sees no evidence to contradict the conclusion that the amendment was explained to the Indians and signed with the same formality that characterized the execution of the treaty in 1871.[218] Rather, the 1875 amendment was intended, in Canada's view, to clarify and bring closure by providing an increase in the benefits paid to the Indians in consideration for their releasing Canada from any unrecorded promises; in counsel's words, "[t]he 1875 amendment to the treaty which is part of the treaty is crystal clear in that if the promise is not on the attached list, the Crown is released from that promise."[219] Moreover, Canada argues that there is no basis for limiting the scope of the amendment to "unfulfilled" outside promises, as the First Nation has urged.[220]

As for the First Nation's assertions that the 1875 amendment was unconscionable or improvident, or that it was secured through undue influence or breach of fiduciary obligation, Canada denies that the amendment worked an unfairness in terms of the Indians being unduly disadvantaged or the government inordinately benefiting:

> The facts of the case demonstrate conclusively that the band argued for and won a concession from the government of the day [of] a 66 per cent increase in annuity payments in exchange for a release of promises alleged to [have been] made at the time of treaty. The band then signed the Order in Council. That is undisputed, uncontradicted and persuasive evidence that none of the tests for undue influence and inequality of bargaining power resulting in lack of consent have been met.[221]

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[217] Written Submission on Behalf of the Roseau River Anishinabe First Nation, March 10, 1999, pp. 51–52.

[218] ICC Transcript, March 25, 1999, pp. 92–93 and 98 (Robert Winogron).

[219] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 18; ICC Transcript, March 25, 1999, pp. 79 and 91 (Robert Winogron).

[220] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 18.

[221] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 21.

Similarly, Canada takes the position that, although its relationship with aboriginal peoples is fiduciary in nature, not every aspect of such a relationship takes the form of a fiduciary obligation. In this case, according to counsel, no fiduciary or other duty existed from 1909 to 1934 that would require Canada to pay for medical aid or to provide notice of the deductions for medical aid from the Band's interest account.[222]

I agree with the First Nation that the treaty right to medical aid should not be considered to have been extinguished by the 1875 amendment. As I have already stated, I start with the proposition, based on the evidence of Oliver Nelson and the recollections of Assiniwinin, that medical aid became a treaty right *as of 1871*, and its status as a treaty right should not be considered to have been in doubt between 1871 and 1875. Deputy Superintendent Spragge's letter of July 18, 1873, and the recommendations of the Board of Indian Commissioners did nothing to limit or expand this already existing right. The evidence is sufficient to substantiate that the right arose in 1871, and this conclusion is supported by the legal principles of treaty interpretation. The only question is whether medical aid *continued* as a treaty right *after* 1875 in the wake of the amendment to Treaty 1.

There can be no doubt that medical aid represented an outside promise. As Oliver Nelson has written, "from the point of view of the Roseau River Anishinabe First Nation and the other Treaty One First Nations, *any agreements made and agreed to in the negotiations of the Treaty of 1871 that were outside the draft treaty document, were the outside promises*."[223] Moreover, the 1875 amendment was concluded "on the express understanding ... that each Chief or other Indian who shall receive such increased annuity or annual payment, *shall be held to abandon all claim whatever against the Government in connection with the so-called 'outside promises' other than those contained in the memorandum* [*of outside promises*] attached to the Treaty."[224] It would seem that, on a straightforward interpretation of the language, medical aid – as an outside promise *not* contained in the memorandum of outside promises – must be deemed to have been abandoned as a basis for claim against Canada.

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[222] Written Submission on Behalf of the Government of Canada, March 10, 1999, pp. 21–22.

[223] Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998, p. 18 (ICC Exhibit 5). Emphasis added.

[224] Order in Council, April 30, 1875, NA, RG 10, vol. 3621, file 4767, reel C-10108 (ICC Documents, pp. 161–64). Emphasis added.

In this context, how should medical aid be treated? As I have already commented, I feel comfortable in assuming that, in preparing the 1875 amendment, Canada's officials knew medical aid was still a concern to the Indians even if Canada was not fully prepared to accept it as a term of treaty. Canada knew that the treaty amendment proposed by Minister of the Interior David Laird would have the effect of foreclosing any future claim that the Indian signatories to Treaty 1 would have in relation to medical aid and any other outside promises not specifically mentioned in the memorandum of outside promises. They also knew in 1875 that the amendment offered very little in the way of real consideration by Canada to the bands. The $2 increase in annuities depicted nothing more than the rate of annuities already promised to the Indians of Treaties 3 and 4 in 1873 and 1874 (and soon to be granted to their counterparts in Treaties 5, 6, and 7); as such, it represented not a revision of the treaty terms, but the mere administrative implementation of what had already become a political reality. Since the level of treaty annuities being paid had already been raised, Canada knew that the Indians of Treaty 1 would not accept an amendment that did not increase annuities when members of neighbouring bands were already receiving $5 – and more for Chiefs and headmen – each year.

It must be remembered that the negotiation of Treaties 1 through 7 took place in the short span of six years. In 1875, both Canada and the First Nations must have been aware that other treaty negotiations had taken place or were likely to take place, and by then they knew the terms that typically formed the subject matter of discussions. In this context, I find it significant that the individual charged by Canada with the responsibility for securing the acceptance of the 1875 amendment was Alexander Morris, Lieutenant Governor of the North-West Territories and Canada's representative in the negotiation of Treaties 4, 5, and 6. It was Morris who, in the course of negotiating Treaty 6 the following year, agreed to make provision for medical care in the form of the "medicine chest" clause. Furthermore, according to Canada's researcher, Frances Foley Smith, "[d]uring the treaty negotiations, he [Morris] assured the Indians that emergency medical care would be provided because this was the 'Queen's way.'"[225] It seems remarkable that Canada should now claim medical aid to have been *extinguished* by the 1875 amendment to Treaty 1 when Canada's own representative, just one year later, was prepared to extend the very same right to the signatories of Treaty 6.

It is also important to realize that the terms of the 1875 amendment were not the product of hard bargaining by the parties culminating in points being won and concessions granted. Instead, the 1875 amendment merely incorporated the memorandum of outside promises, which had been drafted *in 1871*. That document reflected the recollections of Indian Commissioner Wemyss Simpson, Lieutenant Governor Adams G. Archibald, Indian Agent Molyneux St John, and Métis businessman James McKay of *what had already been promised*. Given the likely embarrassment of those four over their own uncertainty regarding the terms of Treaty 1, it is to be expected that the memorandum would have been a conservative accounting of the outside promises. As St John admitted:

> It is but common honesty to say that ... the things which were promised, and those which were refused, mentioned as they were by three apparent authorities and spoken of in no regular communication, were so mixed up that it is little wonder if even the four persons most likely to know the exact state of the case, could hardly agree in the precise definition, when that was attempted to be made [in the memorandum of outside promises], within a month after the Treaty; and not at all surprising that the Indians believe their demands were complied with at the time, and that we are now trying to shuffle out of our obligations.[226]

Like the memorandum of outside promises, the 1875 amendment was drafted by Canada's officials in isolation from, and without the input of, their Indian treaty partners. Unlike Treaty 1 in 1871, the 1875 amendment was approved by order in council *before* being taken to the Indians for "negotiations" – meaning that the Indian signatories were presented with a finished document and had little, if any, opportunity to engage in meaningful discussions to amend its terms. Moreover, when Lieutenant Governor Morris and Indian Commissioner Provencher convened with the Indians to execute the amendment, they did so not in a collective meeting of all bands, as Simpson and Archibald had done in 1871, but on a band-by-band basis. This approach prevented the bands from acting in unison to protect their interests and amounted to nothing more than Canadaimposing its own position regarding the outside promises. For all its shortcomings, Treaty 1 was a shining example of treaty negotiation when compared with the flawed process of the 1875 amendment.

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[225] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, p. 9 (ICC Exhibit 2).

[226] Molyneux St John, Indian Agent, to William Spragge, Deputy Superintendent General of Indian Affairs, February 24, 1873, Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 11–12 (ICC Documents, pp. 102–3).

In all these circumstances, I believe that Canada as a fiduciary owed a duty to the Indians signing the 1875 amendment to disclose *in express terms* which of the various items claimed by the Indians to have been promised during the negotiation of Treaty 1 would be terminated by the amendment. This obligation is particularly so with regard to a right, such as medical aid, that, by 1875, had already been settled and implemented. There is no doubt that considerable effort would have been involved in assembling a list of terminated outside promises, in addition to further embarrassment on the part of Canada's representatives. Similarly, placing such a list before the Indians would probably have made the task of securing their consent to the amendment more awkward and time-consuming.

However, I find considerable force in Roseau River's contention that, since the Indians understood medical aid to have been settled, they believed it was not necessary to deal with the matter in 1875; similarly, they would not have perceived that it formed part of the amendment when it was not expressly mentioned. I believe that Canada's duty as the fiduciary in this situation would have been to disclose to its principals sufficient information to allow them to consider their alternatives and to make an informed decision. Without a clear and realistic understanding of what they would be forgoing – and, perhaps more significant, of what little they would be*gaining* – by agreeing to the 1875 amendment, the Indians were not in a position to be able to assess effectively the "rearranged" bargain into which they were being lured. There is no indication that Canada's representatives in 1875, or at any later date, informed the Indians that they would no longer be able to look to the federal government for medical aid. I believe that it would be unconscionable for Canada to rely on such a one-sided transaction as the basis for denying such aid.

I find further support for this conclusion in the reasons of the Commission in its inquiry into the Pottawatomi rights claim of the Moose Deer Point First Nation.[227] There, after reviewing the decisions of the Supreme Court of Canada in the *Horseman*, *Sioui*, *Badger*, and *Van der Peet* cases on the question of what is required to terminate a treaty right, the Commission stated:

> In the Commission's view, the cumulative effect of these decisions is that, before the implementation of the *Constitution Act, 1982*, the Crown could unilaterally extinguish treaty rights as long as it expressed a "clear and plain" intention to do so. To borrow from McLachlin J in *Van der Peet*, such a "clear and plain" intention is evident where the government actually considers the conflict between its intended action on the one hand and Indian treaty rights on the other and chooses to resolve that conflict by abrogating the treaty.[228]

Given the absence of any wording in the 1875 amendment dealing with the termination of medical aid as a treaty right, I see no such evidence of the requisite "clear and plain" intention in this case. In particular, since Canada in 1875 apparently did *not* regard medical aid as a term of the 1871 treaty, it seems unlikely that its representatives would have considered their actions to be in conflict with Treaty 1, much less that the amendment would abrogate a treaty right to medical aid.

Since the treaty right to medical aid was not expressly extinguished by the 1875 amendment, that right continued to exist after 1875. Against this backdrop, I conclude that the deductions for medical aid from Roseau River's interest trust account from 1909 to 1934 were improper and that Canada owes the First Nation an outstanding lawful obligation under the terms of the Specific Claims Policy. Accordingly, Canada should open negotiations with the First Nation to determine appropriate compensation.

In this context, one further matter must be considered.

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[227] Indian Claims Commission, *Moose Deer Point First Nation Inquiry: Pottawatomi Rights* (Ottawa, March 1999), reported (1999) 11 ICCP 135.

[228] Indian Claims Commission, *Moose Deer Point First Nation Inquiry: Pottawatomi Rights* (Ottawa, March 1999), reported (1999) 11 ICCP 135 at 266–67.

Nature and Scope of the Treaty Promise

I must now consider the nature and scope of the treaty right – specifically, whether Canada's treaty promise was limited to drugs and medicines or whether it also included hospitalization charges and physicians' fees.

The evidence on this point is mixed. St John's report of his meeting with the Pembina bands on September 6, 1872, indicates that the Indians made demands regarding their "sick men" – to which St John replied that they would have to take care of their own sick. Nothing in this demand suggests that the Indians were limiting their demands to drugs and medicines, although, in the context of those times, it might seem reasonable to impose such limits, since doctors and hospitals may have been beyond the reach of even the local non-aboriginal population. Three months later, the St Peter's Band claimed, in the Prince affidavit, to have been promised "medical aid" – which, broadly construed, could be read to include expenses for both hospitalization and doctors. Spragge's letter of July 18, 1873, however, refers to "medicines for the sick," and the Board of Indian Commissioners similarly restricted its recommendation to "[a] supply of simple medicines to be provided for each Reserve."

In determining whether the treaty right should be broadly or narrowly construed, it is possible to draw assistance from jurisprudence spawned by the "medicine chest" clause in Treaty 6. The first such decision was handed down by Angers J of the Exchequer Court in 1935 in *Dreaver v. The King*.[229] In that case, the Chief and councillors of Saskatchewan's Mistawasis Band claimed, among other things, reimbursement of $4,489.95 applied by the Superintendent General of Indian Affairs from band funds towards the purchase of drugs, medical supplies, and medicines on behalf of the Band. Chief Dreaver testified that, following the signing of the treaty, medicines were supplied to the Band free of charge until the Band surrendered land to the Crown in 1918 or 1919, at which time the deductions commenced. Although the circumstances were remarkably similar to the facts in the present case, a unique aspect of the *Dreaver* case is that it was decided in the context of Treaty 6, which contains an express provision stipulating "[t]hat a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.'[230] There is no parallel provision in the written form of Treaty 1. Commenting on the "medicine chest" clause, Angers J stated:

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[229] *Dreaver v. The King* (1935), 5 CNLC 92 (Ex. Ct), Angers J.

> This [clause], in my opinion, means that the Indians were to be provided with all the medicines, drugs or medical supplies which they might need entirely free of charge. The proof does not elicit what the medicines, drugs or medical supplies, mentioned in the statement inserted in paragraph 4 of the petition, were nor does it show the reason why they were charged. Do they constitute all the medicines, drugs and medical supplies furnished to the Indians of the Mistawasis Band by the Department of Indian Affairs or do they only represent a part of what was supplied to them, there is nothing in the evidence to indicate it. Be that as it may, I do not think that the Department had, under the treaty, the privilege of deciding which medicines, drugs and medical supplies were to be furnished to the Indians gratuitously and which were to be charged to the funds of the band. The treaty makes no distinction; it merely states that a medicine chest shall be kept at the house of the Indian Agent for the use and benefit of the Indians. The clause might unquestionably be more explicit but, as I have said, I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians of the Mistawasis Band were to be supplied to them free of charge.[231]

In the result, Angers J ordered Canada to repay the funds to the Band.

Canada submits that *Dreaver*, insofar as it is based on the "medicine chest" clause of Treaty 6, is irrelevant to a claim under Treaty 1 and has, in any event, been overturned by subsequent decisions of the Saskatchewan Court of Appeal in *R. v. Johnston* and *R. v. Swimmer*.[232] Moreover, Canada argues that, in *Manitoba Hospital Commission v. Klein and Spence*,[233] Wilson J of Manitoba's Court of Queen's Bench concluded that "Indian treaties Nos. 1 and 2, applicable to

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[230] *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer and Controller of Stationery, 1964), 4.

[231] *Dreaver v. The King* (1935), 5 CNLC 92 at 115 (Ex. Ct), Angers J.

[232] ICC Transcript, March 25, 1999, p. 108 (Robert Winogron); *R. v. Johnston* (1966), 56 DLR (2d) 749, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS; *R. v. Swimmer* (1970), 17 DLR (3d) 476, [1971] 1 WWR 756, 3 CCC (2d) 92 (Sask. CA), Culliton CJS.

[233] *Manitoba Hospital Commission v. Klein and Spence* (1969), 67 WWR 440 (Man. QB), Wilson J.

Indians in Manitoba, say nothing about medical or hospital care or services," that the "medicine chest" clause of Treaty 6 is not relevant in cases involving Treaty 1, and that, in any event, the clause did not contemplate "provision of all medical services, including hospital care."[234]

In reply, the First Nation questions the result in *Klein and Spence*, given that "there was no evidence put before the Court of an extrinsic nature that is admissible in these types of proceedings" to demonstrate that medical aid was an oral treaty right beyond the four corners of the written treaty document.[235] Counsel further challenged the applicability of the *Johnston* and *Swimmer* cases in the present inquiry:

> [I]t's important to understand that the reasons why those cases were limited or narrowed had everything to do with the language of Treaty No. 6. Those cases had to do with interpreting what a medicine chest meant. At no point were they ever asked to address something as broad as what we suggest exists in the Treaty 1 situation, which is medical aid, which is quite a different thing, and a much broader thing.[236]

The *Johnston* and *Swimmer* cases were factually identical. Canada and Saskatchewan entered into an administrative arrangement providing that Canada would pay hospitalization taxes pursuant to the *Saskatchewan Hospitalization Act*[237] on behalf of only those Indians residing on a reserve or those who had been residing off-reserve for a period of less than 12 months. In each case, the respondent, a treaty Indian, had lived off-reserve for more than 12 months and had failed to pay hospitalization tax, claiming to be exempt from such taxes under the Treaty 6 "medicine chest" and "pestilence" clauses. The "pestilence" clause states:

> That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and

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[234] ICC Transcript, March 25, 1999, p. 106 (Robert Winogron); *Manitoba Hospital Commission v. Klein and Spence* (1969), 67 WWR 440 at 446–47 (Man. QB), Wilson J, citing *R. v. Johnston* (1966), 56 DLR (2d) 749, 56 WWR 565 at 570, 49 CR 203 (Sask. CA), Culliton CJS.

[235] ICC Transcript, March 25, 1999, p. 127 (Rhys Jones).

[236] ICC Transcript, March 25, 1999, p. 127 (Rhys Jones).

[237] *Saskatchewan Hospitalization Act*, RSS 1953, c. 232, and RSS 1965, c. 253.

> certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.[238]

In each case, on being charged with failing to pay the tax, the respondent was acquitted by Policha J of Magistrate's Court, who stated in *Johnston*:

> Referring to the "medicine chest" clause of Treaty No. 6, it is common knowledge that the provisions for caring for the sick and injured in the areas inhabited by the Indians in 1876 were somewhat primitive compared to present day standards. It can be safely assumed that the Indians had limited knowledge of what provisions were available and it is obvious that they were concerned that their people be adequately cared for. With that in view, and possibly carrying the opinion of Angers, J., [in *Dreaver*] a step farther, I can only conclude that the "medicine chest" clause and the "pestilence" clause in Treaty No. 6 should properly be interpreted to mean that the Indians are entitled to receive all medical services, including medicines, drugs, medical supplies and hospital care free of charge. Lacking proper statutory provisions to the contrary, this entitlement would embrace all Indians within the meaning of the *Indian Act*, without exception. In my opinion, the accused falls within the exemption from taxation set forth in s. 23(1)(iv) of the Regulations and is not required to pay the tax.
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> I find the accused not guilty as charged.[239]

On the appeal in *Johnston*, Culliton CJS prefaced his analysis with the comment that the issue before the courts in that case was "not one relating to the general responsibility of the Government of Canada to Indians, but simply whether the learned trial Judge was right in his interpretation of the 'medicine chest' and 'pestilence' clauses of the Treaty."[240] Accordingly, in the later *Swimmer* case – undoubtedly in response to Chief Justice Culliton's remark – Policha J added that "only the Parliament of Canada could legislate in respect of Indians and consequently s. 21 of the *Saskatchewan Hospitalization Act* Regulations, and s. 21(1)(v) of the *Saskatchewan Medical Care Insurance Act* Regulations, were *ultra vires*" – that is, beyond the legislative competence of the province.[241]

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[238] *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer and Controller of Stationery, 1964), 4.

[239] Policha J, as quoted in *R. v. Johnston* (1966), 56 DLR (2d) 749 at 751, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS.

[240] *R. v. Johnston* (1966), 56 DLR (2d) 749 at 752, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS.

In both *Johnston* and *Swimmer*, Culliton CJS, on behalf of an identical five-member panel of the Saskatchewan Court of Appeal, allowed the appeals. With regard to the*Johnston* case, he stated:

> In the interpretation of the clauses of a treaty, one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made. To do so, too, it is both proper and advisable to have recourse to whatever authoritative record may be available of the discussions surrounding the execution of the treaty. I agree with the opinion expressed by Norris, J.A., in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [aff'd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], when, at p. 629, he said:
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>> The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in *Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches,*Read v. Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652–4.[242]

Culliton CJS then examined Alexander Morris's account of the negotiations preceding Treaty 6,[243] noting that the treaty had been concluded in the shadow of the virulent smallpox epidemics of the early 1870s. He remarked that the Indians had clearly approached the talks greatly fearing both pestilence and starvation, with the Crown's response to those fears manifested in the "pestilence" clause. With regard to the case before him, Culliton CJS concluded that the "pestilence" clause was irrelevant. On the subject of the "medicine chest" clause, however, he commented:

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[241] Policha J, as cited in *R. v. Swimmer* (1970), 17 DLR (3d) 476, [1971] 1 WWR 756, 3 CCC (2d) 92 (Sask. CA), Culliton CJS.

[242] *R. v. Johnston* (1966), 56 DLR (2d) 749 at 752, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS.

[243] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Bedfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991), 178.

> There is nothing in Morris' treatise to suggest that any meaning should be given to the words "medicine chest" other than that conveyed by the words themselves in the context in which they are used. The only reference I can find in the treatise is at p. 218, where the author states:"'A medicine chest will be kept at the house of each Indian agent, in case of sickness amongst you.'" The "medicine chest" clause in the Treaty incorporates this undertaking.
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> Again, on the plain reading of the "medicine chest" clause, it means no more than the words clearly convey: an undertaking by the Crown to keep at the house of the Indian agent a medicine chest for the use and benefit of the Indians *at the direction of the agent*.... The clause itself does not give to the Indian an unrestricted right to the use and benefit of the "medicine chest" but such rights as are given are subject to the direction of the Indian agent. Such limitation would indicate that the obligation was to have physically on the reservations, for the use and benefit of the Indians, a supply of medicine under the supervision of the agent. I can find nothing historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the Crown's obligation to provide a "medicine chest" had in contemplation provision of all medical services, including hospital care.[244]

In an article entitled "The Medicine Chest Clause in Treaty No. 6," Peter Barkwell comments that, although Culliton CJS recited the appropriate principle from *White and Bob* before relying on the Morris text, the Court of Appeal's application of the *White and Bob* principle may, in fact, have paid only "lip service" to the words of Norris JA in that earlier case:

> He [Culliton CJS] then considered the account of the treaty negotiation contained in Lieutenant Governor Morris's work. This is the only historical work to which His Lordship referred. It is not possible to tell whether this reference was the result of his own research, whether it was the only historical account submitted by counsel, or whether it was the sole work that His Lordship considered authoritative. Nothing in the volume referred to indicates what the Indians thought they had obtained during the negotiations. Morris says nothing which would indicate the degree of Indian comprehension of the treaty terms, and it might be naïve to expect that the chief government negotiator would present a totally objective account of the proceedings.[245]

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[244] *R. v. Johnston* (1966), 56 DLR (2d) 749 at 753, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS.

[245] Peter Alan Barkwell, "The Medicine Chest Clause in Treaty No. 6," [1981] 4 CNLR 1 at 16.

Finally, after considering Justice Angers's decision in *Dreaver* that the Indians of Treaty 6 were entitled to be supplied with all medicines, drugs, and medical supplies free of charge, Culliton CJS concluded:

> In reaching the foregoing conclusion, the learned Justice [Angers] appears to have relied on the evidence of the suppliant Dreaver, who testified he was present during the negotiation of the Treaty and that it was understood that all medicines were to be supplied free to the Indian. There appears to be nothing in his evidence to support any wider interpretation of the clause than that given to it by Mr. Justice Angers. While I express no opinion as to the correctness of the interpretation of the clause as made by Mr. Justice Angers, I do not think, with respect, that the interpretation so given justifies the extended meaning attributed thereto by the learned Judge [Policha] of the Magistrate's Court.[246]

In his own words, Culliton CJS did not overrule the decision of Angers J in *Dreaver*. Rather, he merely concluded that it did not extend *beyond* medicines, drugs, and medical supplies to other medical services, including hospitalization. However, Barkwell suggests that the implications of Chief Justice Culliton's decision went much further:

> Although the learned Chief Justice stated in that case that he was expressing no opinion on the decision reached in *Dreaver*, by ruling that the medicine chest clause means "no more than the words clearly convey", it is respectfully submitted that he ignored, if not overruled, *Dreaver*. In *Dreaver*, Mr. Justice Angers, after hearing the evidence, moved beyond the "plain reading" of the clause and held that it covered all medicines, drugs and medical supplies. He did not go so far as to include hospital care, but there is no reason why, given the appropriate evidence, he might not have done so. Chief Justice Culliton, on the other hand, apparently using only Alexander Morris as a historical source, shut the door to any liberal interpretation of the clause.[247]

Four years later, in the *Swimmer* appeal, Culliton CJS adopted his earlier reasons from *Johnston*, adding somewhat icily that there was "nothing in the present case that justified the rejection of this view by the learned Judge [Policha J] of the Magistrates' Court." As to the constitutional question of whether the regulations under the *Saskatchewan Hospitalization Act* and the *Saskatchewan Medical Care Insurance Act* were beyond the scope of provincial jurisdiction, he remarked:

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[246] *R. v. Johnston* (1966), 56 DLR (2d) 749 at 754, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS.

[247] Peter Alan Barkwell, "The Medicine Chest Clause in Treaty No. 6," [1981] 4 CNLR 1 at 18–19.

> As I have already stated, the terms of Treaty No. 6 do not impose upon the Government of Canada the obligation of providing, without cost, medical and hospital services to all Indians. Moreover, I know of no Act of Parliament that purports to do so. Under these circumstances, the respondent was subject to the provisions of the *Saskatchewan Hospitalization Act* and the *Saskatchewan Medical Care Insurance Act*, being laws of general application, and liable for the tax thereunder.[248]

Meanwhile, at about the same time, the Manitoba courts, on a somewhat different set of facts in *Klein and Spence*, were addressing the extent of an Indian's right to hospital care under Treaty 1. In that case, Spence was a treaty Indian and a member of the Peguis Band who had been struck by a car operated by an uninsured driver. Klein, a lawyer, successfully collected the full amount of the judgment plus interest and costs from the provincial treasurer under the *Unsatisfied Judgment Fund Act*.[249] After Klein deposited the proceeds of judgment in his trust account, the Manitoba Hospital Commission claimed to be entitled to the sum of $4,290 from that account to cover Spence's hospital costs. On advice from her Band, Spence objected to the Commission's claim "on the grounds that she was a Treaty Indian." Caught in the middle, Klein proceeded by interpleader to obtain the court's instructions on how the challenged amount should be distributed.

In Manitoba's Court of Queen's Bench, the equities were decidedly against Spence, given that she had provided written authorization of the settlement with the provincial treasurer, including the $4,290.00 in "hospital accounts" payable as an item of "special damages."[250] In other words, since Spence had not paid the hospitalization costs herself, she would have profited had she been allowed to keep the reimbursed costs, and the Hospital Commission would have been out of pocket. Nevertheless, one of the issues facing the Court was whether Spence, as a treaty Indian, was entitled as of right to hospital services. Wilson J wrote:

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[248] *R. v. Swimmer* (1970), 17 DLR (3d) 476 at 480–81, [1971] 1 WWR 756, 3 CCC (2d) 92 (Sask. CA), Culliton CJS.

[249] *Unsatisfied Judgment Fund Act*, SM 1965, c. 89.

[250] "Damages may be either 'general' or 'special'. General damages are such as the law will presume to be the direct, natural and probable consequences of the act complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the act for they do not follow in the ordinary course but are exceptional in character. These damages should be specifically pleaded and proved. Sometimes it is said that special damages are those which permit of exact computation of a definite sum of money": *The Canadian Law Dictionary* (Toronto: Law and

> As to that, I can only say that I saw no evidence to demonstrate this absolute right to hospital care. To the extent that the *Indian Act* touches the question at all, sec. 72(1)(g) [which authorized the Governor in Council to make regulations to provide medical treatment and health services for Indians] is permissive only.*Indian treaties Nos. 1 and 2, applicable to Indians in Manitoba, say nothing about medical or hospital care or services*. Indian treaty No. 6 relates to Indians in what is now the province of Saskatchewan and would not seem applicable....[251]

As Canada notes in its argument in the present inquiry, Wilson J went on to adopt Justice Culliton's conclusion in *Johnston* that even the "medicine chest" clause in Treaty 6 did not convey the provision of all medical services, including hospital care.[252]

In its own review of the law on this issue, the Commission has learned that*Klein and Spence* was appealed to the Manitoba Court of Appeal, where Smith CJM held on behalf of a unanimous panel:

> Counsel argued ... that, as a Treaty Indian, Mrs. Spence was not "legally liable to pay to a hospital for care, treatment ..." that she received. He submitted that an obligation to pay for hospital services, in the absence of an express agreement, may only be implied from the circumstances, and that since for a long period of time Indians had been supplied with hospital services at the expense of the federal Government, without such Indians ever being asked or expected to pay for them, no agreement to pay could be implied on the part of Mrs. Spence in this case.
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> Whether prior to the *Hospital Services Insurance Act* a Treaty Indian was not liable for the payment of hospital services, or whether the true position was that he

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Business Publications (Canada) Inc., 1980), 107.

[251] *Manitoba Hospital Commission v. Klein and Spence* (1969), 67 WWR 440 at 446 (Man. QB), Wilson J. Emphasis added.

[252] ICC Transcript, March 25, 1999, p. 106 (Robert Winogron); *Manitoba Hospital Commission v. Klein and Spence* (1969), 67 WWR 440 at 446–47 (Man. QB), Wilson J.

> was liable for them but was being indemnified by the federal Government, is not a matter we need to decide in this case.
>
> The present position must be decided in the light of the *Hospital Services Insurance Act*. That Act applies to all residents, including Indians. See s. 7 of the Act and also s. 87 of the *Indian Act*, R.S.C. 1952, c. 149.
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> Dominion Order-in-Council, P.C. 1958-15/879, authorized the Minister of National Health and Welfare to pay on behalf of Indians premiums "required to be paid as a condition of eligibility for receiving hospital care under the plan in operation in the province...". *This indicates that Indians were to be in the same position as other persons in the Province with respect to hospital services*. In the present case such premiums were so paid for Mrs. Spence during such period as she was not employed. When she was employed her premiums were deducted by her employer and remitted to the Manitoba Hospital Commission in the same way as for any other employee in the Province.[253]

Considered in isolation, the foregoing authorities, with the exception of*Dreaver*, would tend to steer me towards the conclusion that the treaty right to medical aid will be narrowly confined to drugs, medicines, and medical supplies under the "medicine chest" clause of Treaty 6. However, the *Johnston*, *Swimmer*, and *Klein and Spence* cases were all decided before the development of the more recent Supreme Court of Canada jurisprudence relating to the interpretation of treaties, and for this reason I question whether they remain good law.

My reservations are further underscored by the recent decision of Prothonotary Hargrave of the Federal Court, Trial Division, in *Wuskwi Sipihk Cree Nation v. The Queen*,[254] handed down a few weeks before the oral submissions by counsel in the present inquiry. In that case, several First Nations objected to an agreement between the federal Department of National Health and Welfare and Manitoba's Department of Health to divide jurisdiction and responsibility for public health services among several communities, including First Nations, in the province. Relying on, among other things, "various treaties, including Treaty No. 6 [and] a general understanding that the federal government has provided and will continue to provide health care where treaties are silent," the First

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[253] *Re Manitoba Hospital Commission and Klein and Spence* (1969), 9 DLR (3d) 423 at 423–24 (Man. CA), Smith CJM. Emphasis added.

[254] *Wuskwi Sipihk Cree Nation v. The Queen* (unreported, January 21, 1999, Docket No. T-383-98) (FCTD). As of the date of this report, the decision of Hargrave P in this interim application had not been appealed and the parties were apparently seeking to resolve the dispute through mediation.

Nations argued that this delegation was improper. Consequently, they sought declaratory and mandatory relief with a view to obtaining adequate and continuous health care. In the course of an interim application to determine whether the Federal Court had jurisdiction to hear the matter, Hargrave P referred to the "medicine chest" clause in Treaty 6 and its consideration by Angers J in *Dreaver* before turning to the comments of Culliton CJS in *Johnston*:

> Now the *Johnston* case stands for the proposition that in 1966 the medicine chest clause did not entitle an Indian, not living on a reserve, to claim exemption from the payment of the hospitalization tax. The Court of Appeal went on to question the broad interpretation given to the medicine chest clause by Mr. Justice Angers in the *Dreaver* case, but that is a gratuitous comment, which was unnecessary to the decision in the *Johnston* case. However, of importance is the comment by the Court of Appeal in *Johnston* that treaty provisions must be given a literal meaning and essentially that the Crown only undertook to maintain a medicine chest for the benefit of Indians at the direction of the Indian Agent. In the view of the Court of Appeal, the clause did not contemplate the provision of medical services, including hospital care. In the light of *The Queen v. Sparrow*, [1990] 1 S.C.R. 1075, a decision in which the Court was able to take into account the *Constitution Act of 1982*, concluding that aboriginal rights ought to be interpreted in a flexible manner in order to permit their evolution rather than leaving such rights frozen at a past time, this *dicta* in *Johnston* is now in all probability wrong.[255]

In *Sparrow*, Dickson CJ and La Forest J, writing on behalf of the entire Court, had been called upon to consider aboriginal fishing rights – specifically, whether the restriction in the federal *Fisheries Act* regarding the permitted length of a drift net was inconsistent with section 35(1) of the *Constitution Act, 1982*, and therefore invalid. Section 35(1) states:

> **35.**(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

As to the implications of the word "existing" in this section, the Court ruled:

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[255] *Wuskwi Sipihk Cree Nation v. The Queen* (unreported, January 21, 1999, Docket No. T-383-98), para. 12 (FCTD).

> The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*....
>
> Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations.... As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history....
>
> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," *supra*, at p. 782,[256] the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.[257]

Similar statements have been made by Dickson CJ in *Simon v. The Queen*,[258] by L'Heureux-Dubé J (in dissent) in *R. v. Van der Peet*,[259] by Cory J in *R. v. Sundown*,[260] and, most recently, with specific application to treaty rights, by Binnie J in *R. v. Marshall*.[261]

After reviewing *Sparrow*, Hargrave P in *Wuskwi Sipihk* concluded that the philosophy expressed by the Supreme Court of Canada means that *Johnston* must be considered to have been overruled to the extent of the decision by Culliton CJS that the "medicine chest" clause should be given a narrow literal meaning:

> To sum up this aspect, Mr. Justice Angers took a proper approach in his 1935 decision in *Dreaver* (*supra*), reading the Treaty No. 6 medicine chest clause in a contemporary manner to mean a supply of all medicines, drugs and medical supplies.

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[256] Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Canadian Bar Review* 727 at 782.

[257] *R. v. Sparrow*, [1990] 1 SCR 1075 at 1091–93, Dickson CJ and La Forest J.

[258] *Simon v. The Queen*, [1985] 2 SCR 387 at 402, Dickson CJ.

[259] *R. v. Van der Peet*, [1996] 2 SCR 507 at 584, L'Heureux-Dubé J.

[260] *R. v. Sundown*, [1999] 1 SCR 393 at 410, Cory J.

[261] *R. v. Marshall*, [1999] 3 SCR 456 at 499, Binnie J.

> Certainly, it is clear that the Saskatchewan Court of Appeal took what is now a wrong approach in its literal and restrictive reading of the medicine chest clause in the 1966 decision in *Johnston* (*supra*). In a current context the clause may well require a full range of contemporary medical services.[262]

Therefore, I conclude that, even if the parties to Treaty 1 contemplated only drugs and medicines during their negotiations – as their counterparts in Treaty 6 apparently did – the treaty must still be interpreted in a way that will not cause the right to be frozen in time, but will permit it to evolve into a contemporary form. In my view, this means that the treaty promise must be construed as including a right to all medical services for which deductions were made from Roseau River between 1909 and 1934, including hospitalization and the attendance of physicians.

Conclusion

In closing, I wish to make one comment with regard to the reasons prepared by Commissioner Corcoran. While I differ with her on whether medical aid constituted an ongoing treaty right after 1875 and whether the deductions from the First Nation's interest account gave rise to an outstanding lawful obligation, I fully agree with her analysis on the question of the Commission's supplementary mandate. In my view, that analysis forms an alternative basis for Canada's liability to the First Nation. In particular, I believe that Canada's actions, in addition to being inconsistent and unfair, were paternalistic and inconsistent with the government's duties as a fiduciary and trustee of the First Nation's interest trust account. Given that the deductions were made unilaterally by Canada for decades, in isolation from its treaty partner and without notice, I believe that Canada's administration of the trust was flawed.

That being said, it is important, in my view, to exercise caution in comparing the delivery of medical aid under the numbered treaties of western Canada – which typically involved the extinguishment of aboriginal title in what might be viewed as an ongoing and relatively homogeneous process – and under the many highly individualized treaties of peace and friendship that characterized various areas of central Canada and the Maritime provinces. Canada takes the position that, regardless of the treaty area involved, it has always provided medical aid to Indians as a matter of policy, not treaty, and that those bands with the financial resources to pay have been called upon to do so. Although I agree with Commissioner Corcoran that, notwithstanding Canada's position, the evidence before us suggests inconsistencies and unfairness in the delivery of medical aid to Roseau River and perhaps other First Nations, I believe that weighing the differences in the medical treatment of bands in various treaty areas, and indeed even of other bands in Treaty 1, is beyond the scope of what the Commission can hope to accomplish in the context of the present inquiry. For this reason, I have chosen to limit my comments to the facts of this specific case. Nevertheless, I agree that this important subject of medical aid warrants a comprehensive joint review by Canada and the First Nations.

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[262] *Wuskwi Sipihk Cree Nation v. The Queen* (unreported, January 21, 1999, Docket No. T-383-98), para. 12 (FCTD).

For all the foregoing reasons, I find that the deductions from Roseau River's interest trust account from 1909 to 1934 were improper. As I have already stated, Canada should open negotiations with the First Nation with a view to compensating it for those inappropriate deductions. Compensation should be fixed on the basis that the First Nation was, and is, entitled, under Treaty 1, to full medical services available, including drugs, medicines, hospitalization, and doctors' services.

REASONS OF COMMISSIONER CORCORAN

I have had the opportunity to review the decision of my colleague, Commissioner Bellegarde. With respect, I differ with his view of the evidence and the application of the legal principles of treaty interpretation. I also differ on the application of the "medicine chest" case law that arises under Treaty 6. As a result, because I cannot concur that Treaty 1, as amended in 1875, gave rise to a treaty right to medical aid, it becomes necessary for me, unlike my colleague, to address the remaining issues argued by the parties: whether the deductions constituted a breach of the*Indian Act* or the 1903 surrender, and whether the Roseau River people relied on government-funded medical aid to the detriment of their own healing methods. In addition, I believe it is necessary to examine whether, in the circumstances of this inquiry, the Commission should tender a recommendation under its supplementary mandate.

Issue 1 Breach of Treaty Promise

> **Did the terms of Treaty 1 include a promise to provide "medical aid" and, if so, has that promise survived the 1875 amendment to the treaty?**

For the purposes of my analysis on the treaty issue, it is necessary for me to consider three questions. First, does the evidence in this inquiry or do principles of treaty interpretation permit the conclusion that medical aid was promised during the negotiation of Treaty 1? Second, what was the effect of the amendment of 1875? Third, even if there is no treaty right to medical aid under Treaty 1, can it be said that the right to a "medicine chest" under Treaty 6 extends to Treaty 1 territory?

Medical Aid as a Term of Treaty

The first issue placed before the Commission is whether the terms of Treaty 1 included a promise of medical aid and, if so, whether that promise survived the 1875 amendment. Clearly, the initial inquiry must be whether such a promise was made in 1871, but there is no provision in the written form of the treaty to that effect. The second aspect of this issue – whether the promise, if made, survived the 1875 amendment – will be irrelevant if no promise was made in the first place. As no express promise is evident from either the treaty or the 1875 amendment, I must look to extrinsic evidence and liberal principles of treaty interpretation to determine whether such a promise was intended or can be implied from the parties' prior or subsequent conduct.

First, I will examine the principles of treaty interpretation and the scope of their application. Second, I will review the evidence presented by the parties to determine what conclusions can be drawn from the circumstances surrounding the making of the treaty promises. Finally, I will apply the tests established by the case law to the facts in this case to determine whether medical aid should properly be considered a right promised under treaty.

Principles of Treaty Interpretation

I agree with Commissioner Bellegarde that the cases dealing with treaty interpretation instruct us to apply three principles: first, to interpret treaty terms liberally; second, to resolve ambiguities in favour of the Indians; and, third, to have regard to extrinsic evidence. I propose to apply the first and second principles in the third part of my analysis where I will consider those principles in the context of the facts before the Commission.

In applying these principles, it is also important to keep in mind the caution expressed by Lamer J in *R. v. Sioui*:

> Even a generous interpretation of the document ... must be realistic and reflect the intention of both parties, not just that of the Hurons. *The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.*[263]

Similar cautions were expressed by the Nova Scotia Court of Appeal in *Marshall*:

> Lamer J. confirms that the goal is to deduce the common intention of the parties by interpreting the treaties in their historical context....
>
> In ascertaining the common intention the court must take into consideration the context in which treaties were negotiated and committed to writing, including the limitations of the parties. *The resulting interpretation must, however, be a realistic one.*[264]

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[263] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069. Emphasis added.

[264] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 265–66 (NSCA). Emphasis added.

On the appeal to the Supreme Court of Canada, Binnie J in *Marshall* clearly advocated a reasonable approach to interpretation:

> "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui*, *supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (emphasis added) (*Sioui*, *per* Lamer J., at p. 1069). In *Taylor and Williams*, *supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). The historical record in the present case is admittedly less clear-cut, and there is no parallel concession by the Crown.[265]

As in *Marshall*, the record in the present case is not clear-cut and the Crown has not conceded that the verbal promises included the term alleged by the First Nation.

Having determined that extrinsic evidence of the historical context surrounding the negotiation of a treaty may be relevant where a First Nation contends that the written terms do not reflect the true intentions of the parties, Lamer J in *Sioui* stated that the following factors, first enumerated in *R. v. Taylor and Williams*, are relevant to an analysis of the historical background and may assist the Court in determining the intent of the parties:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,

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[265] *R. v. Marshall*, [1999] 3 SCR 456 at 474, Binnie J.

4. evidence of relations of mutual respect and esteem between the negotiators, and
5. the subsequent conduct of the parties.[266]

In *Sioui*, a preliminary issue was whether a treaty existed at all, and Lamer J held that "the factors mentioned may be just as useful in determining the *existence* of a treaty as in *interpreting* it." In the present case, I have no doubt that the parties intended to enter into a treaty. It seems clear that they approached each other with mutual respect and esteem. Moreover, although the delivery of medical aid would *not* have constituted a *continuous* exercise of a right because Canada had just acquired responsibility for the aboriginal and other inhabitants of Manitoba, it is nevertheless safe to conclude that a treaty resulted because the parties sought to establish a framework for future relations between Canada and the Indians in a manner that was characterized, to use Justice Lamer's words in *Sioui*, by "the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."[267]

The Evidence

It is less certain whether the parties to Treaty 1 intended to include medical aid as one of its provisions. In an effort to resolve this question, the parties have introduced extrinsic evidence relating to the historical context of the period, the specific circumstances associated with the negotiation and execution of Treaty 1, and the subsequent conduct of the parties. Each party insists that there is evidence to support its position, and neither is entirely wrong in making this claim.

The negotiation of the early numbered treaties in the Canadian west coincided with the devastation of many Indian communities by smallpox and other virulent infectious diseases, the decline of the buffalo, and the onset of widespread starvation and turbulence in the lives of prairie bands. It is significant that, by the time Treaty 1 was signed in 1871, Canada's representatives had already responded to the smallpox epidemic in 1870 without any treaty stipulation requiring them to do so. Moreover, as we have seen, the Annual Report of Indian Affairs for the year ending

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[266] *R. v. Sioui*, [1990] 1 SCR 1025 at 1045, Lamer J, quoting *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227.

[267] *R. v. Sioui*, [1990] 1 SCR 1025 at 1044, Lamer J.

June 30, 1872 – the fiscal year during which Treaty 1 was executed – shows expenses for "medical relief" charged against the Nova Scotia and New Brunswick "Indian Funds," the services of medical attendants assessed against the "Lower Canada [Quebec] Indian Fund," and "medicines," "medical services," and "medical comforts" charged to the Indian Land Management Fund and the Chippewas of Sarnia, the Mohawks of Bay of Quinté, and the Six Nations of Grand River in Ontario.[268] Clearly, in other parts of Canada, some bands with resources were already paying at least part of their own medical expenses.

Remarkably, however, while accounts of the Treaty 6 negotiations as highlighted by Culliton CJS in *Johnston*[269] clearly demonstrate the desire of the Indians in that territory to be fed and given such assistance as might be necessary in times of pestilence or general famine, there are no such references in the *Manitoban* or in other contemporary accounts of the discussions preceding Treaty 1. Significantly, there is little evidence before the Commission to indicate that the Indians of Treaty 1 were ravaged by the epidemics preceding the treaty in the manner that the Indians of other treaty areas were. Indeed, the oral history recounted by Oliver Nelson stated that Roseau River's leaders did not want Canadian medical aid, and that they accepted it only to satisfy the members of other bands.

Furthermore, there are sound reasons for suggesting that medical aid was likely *not* contemplated by the parties to Treaty 1. At the forefront of the Indians' concerns during the negotiations were matters such as land, annuities, ongoing hunting, fishing, and trapping rights, and the provision of farming implements to ease the conversion from the traditional way of life based on the buffalo hunt to an agrarian-based economy. Unlike hunting, fishing, and trapping, medical aid in the sense contemplated by this inquiry was not the product of long-practised traditional pursuits of an aboriginal people; if it existed at all in 1871, Canadian medical aid on the prairies was virtually non-existent and, in all probability, not something that the Indian negotiators would have fought assiduously to acquire as a promise from Canada. It is inappropriate to impose modern-day notions of medical aid on the parties bargaining in 1871 when there were likely no hospitals, few if any doctors, and limited access to medicines of any sort in Manitoba at that time. Any medical aid that might have been available would have had to be provided by the newly arrived Canadian authorities, who themselves would have had little or no capability of delivering it.

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[268] Return C, "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces, during the Year Ending 30th June, 1872, out of Upper Canada Funds"; Return E, "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces, during the Year Ending 30th June, 1872, out of Nova Scotia Funds"; Return E (1), "Statement of Special Payments, Contingent and Incidental Expenditures by the Indian Branch, Department of the Secretary of State for the Provinces, during the Year Ending 30th June, 1872, out of New Brunswick Funds," Canada, Parliament, *Sessional Papers*, 1873, No. 23, "Annual Report of the Department of Indian Affairs for the Year Ended 30 June 1872," pp. 46–47, 50, and 51 (ICC Documents, pp. 114–15, 117, and 116, respectively).

[269] *R. v. Johnston* (1966), 56 DLR (2d) 749 at 752–53, 56 WWR 565, 49 CR 203 (Sask. CA), Culliton CJS.

While I appreciate the First Nation's arguments regardingthe significance of the approach made by the Pembina bands to Molyneux St John in September 1872, the delivery of the Prince affidavit in January 1873, and Deputy Superintendent Spragge's letter of July 18, 1873, directing the delivery of "[m]edicines for the sick," I do not consider any of these facts to be decisive. Although the Pembina bands claimed medical assistance under treaty, St John recalled no promise of this sort when the treaty was made, and he reportedly advised the Indians that they "[m]ust take care of their own sick." Similarly, when Spragge's instructions are considered in the context of his statement that "St. John [had] particularized the presents which *it was understood* that Governor Archibald & Commr. Simpson had promised should be given," I see Canada's point that it is not clear *whose* understanding was being identified. Spragge's letter is inconclusive; it is *not* the express confirmation of medical aid as a treaty promise that the First Nation would have the Commission find it to be. It is true that the Roseau River Band did not pay medical expenses from its own trust funds for some 38 years following the treaty, but in the early years, before the arrival of non-aboriginal doctors and hospitals, band members may have continued to rely on traditional healing practices. Later, when Canadian medical aid became available, the people of Roseau River may have paid for such services from their personal financial resources on hand, or the Crown may have paid medical expenses from general appropriations until it considered, after the 1903 surrender, that the Band's trust accounts contained sufficient funds to pay some of those expenses.

Even if St John's recommendation *did* include medical aid, I would find it surprising for him to have made such a recommendation as a proposed fulfilment of a treaty promise when that would have directly and expressly contradicted his earlier statements. I consider it more probable that, if

St John recommended medical aid, he would have done so in the spirit of the recommendations of the Board of Indian Commissioners in 1874, on which he participated as secretary and as the only person who had actually attended the treaty negotiations. At that time, the board members sought to prepare a new list of concessions on a "without prejudice" basis that, had it been placed before and accepted by the Indians, would have resolved the outside promises problem. In my view, the Board's recommendations represented a *proposal for settlement* rather than an *enumeration of treaty promises*. As such, those recommendations went beyond the scope of the written form of the "treaty," but also beyond the memorandum of outside promises prepared by Archibald, Simpson, McKay, and St John in the fall of 1871. I consider the idea of a settlement proposal entirely consistent with St John's report on October 22, 1873, that the Indians, having by that time learned of the more favourable terms granted under Treaty 3, "said there could be no satisfaction about the matter until I or some one else was authorized to *re-arrange the bargain*."[270]

Application of Legal Principles to the Facts of This Case

Where does this reasoning leave us? Under general principles of law, a claimant must adduce sufficient evidence to make his or her case, in the absence of which the claim will fail. Similarly, the Specific Claims Policy stipulates that "the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, *the burden of which rests with the claimant*."[271] Given the equivocality of the evidence, I cannot conclude that the First Nation has established medical aid to have been a treaty promise.

What, then, am I to make of the principles of treaty interpretation that direct me to interpret treaty provisions generously, with ambiguities or doubtful expressions resolved in favour of the Indians? Do these principles apply only where there is an express written or oral statement, the meaning of which the parties dispute, or do the principles extend to situations in which there is doubt whether a promise was made in the first place? In other words, do the principles mean that, where the evidence is not clear whether a treaty includes a particular term, the scales are to be tipped in favour of a First Nation to find that a treaty obligation exists?

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[270] Molyneux St John, Indian Agent, to J.A.N. Provencher, Indian Commissioner, October 22, 1873, Canada, Parliament, *Sessional Papers*, 1875, No. 8, "Annual Report of the Department of the Interior for the Year Ended 30 June 1874, Report of the Deputy Superintendent of Indian Affairs," p. 61. Emphasis added. The documentary record in this inquiry includes an excerpt from this document in transcribed form (ICC Documents, p. 134).

[271] *Outstanding Business*, 31; reprinted in (1994) 1 ICCP 184. Emphasis added.

I do not think the cases go that far. In my view, although Lamer J in *Sioui* stated that the five factors mentioned in *R. v. Taylor and Williams* "may be just as useful in determining the existence of a treaty as in interpreting it," I have *already* applied those factors with a view to determining whether a treaty term of medical aid *existed*. The factors did not resolve that question. I believe that it is only once a term has been found to *exist*, albeit ambiguously, that the liberal principles of treaty interpretation can be applied to resolve the ambiguity and give meaning to that term. Ambiguity can arise either on the face of the document or, even if it appears that the document is clear on its face, from the historical context. However, liberal principles of interpretation are not meant to *create* treaty terms where it has *not* been established that such terms were *intended*. As Binnie J wrote in *Marshall*, it is only because of the "special difficulties of ascertaining what in fact was agreed to" in cases involving Indian treaties that the courts are permitted to employ a flexible approach to treaty interpretation to determine "the existence of a treaty ... the completeness of any written record ... and the interpretation of treaty terms *once found to exist*."[272]

Even if it might be argued, however, that a generous interpretation of Treaty 1 in favour of the Indians would give rise to a treaty right to medical aid as of 1871, such a finding would not aid the First Nation's cause, given my view of the 1875 amendment.

The 1875 Amendment

The 1875 amendment stipulated that Canada would

> ... raise the annual payment to each Indian under Treaties 1 and 2 from $3.00 to $5.00 per annum, and make payment over and above such sum of $5.00 of $20.00 each and every year to each Chief and a suit of clothing every three years to each Chief and each Headman, allowing two Headmen to each Band, *on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity or annual payment, shall be held to abandon all claim whatever against the*

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[272] *R. v. Marshall*, [1999] 3 SCR 456 at 474, Binnie J.

> *Government in connection with the so-called "outside promises" other than those contained in the memorandum [of outside promises] attached to the Treaty.*[273]

By Roseau River's own admission, medical aid was, at least initially, an outside promise. There is no mention of medical aid in the written form of Treaty 1 as approved by the Order in Council dated September 12, 1871, and Oliver Nelson acknowledged that "any agreements made and agreed to in the negotiations of the Treaty of 1871 that were outside the draft treaty document, were the outside promises."[274] Similarly, by arguing that medical aid *ceased* to be an outside promise by virtue of its being recognized and implemented as a treaty right by Deputy Superintendent Spragge, counsel has tacitly conceded that medical aid *started out* as an outside promise.[275]

Since the 1875 amendment clearly and unambiguously provided that all promises other than those contained in the memorandum of outside promises were deemed to be abandoned, and since medical aid was not referred to in the memorandum of outside promises, medical aid ceased to exist as a treaty promise (if it ever *did* exist) after 1875. In fact, the precise nature and effect of the 1875 amendment turns on whether medical aid is considered to have been a treaty promise in 1871. In my view, the status of medical aid as a treaty right was unclear between 1871 and 1875 because the parties failed to identify the outside promises adequately. In 1875, the parties resolved the confusion by agreeing, in consideration for a $2 increase in annuities, that only those outside promises expressly listed in the memorandum of outside promises would be treated as treaty promises. It was only at that time that the memorandum of outside promises became part of the treaty. As a result, the 1875 amendment amounted to a *clarification* of *uncertain* treaty terms rather than an *extinguishment* of *existing* treaty terms.

In so saying, I have carefully considered Roseau River's arguments regarding the significance of the fact that the April 30, 1875, Order in Council signed by the Indians made no explicit reference to a treaty right to medical aid being terminated as a result of the amendment. I have also considered the First Nation's submissions challenging the efficacy of the 1875 amendment. With respect, I cannot agree with those submissions. I see no evidence to suggest that the transaction was unconscionable or that it was procured through undue influence. It is difficult to reconcile the First Nation's submission that the Indian negotiators – who, with the experience gained in previous treaty discussions in the United States, had been able to push Canada's negotiators to make various concessions on the evening of August 2, 1871 – were nevertheless unaware of and unable to protect their own interests when the time came to amend Treaty 1. They knew that the 1875 amendment was intended to settle what constituted a treaty right, they knew the issues they wanted resolved in reaching such a settlement, and they must be presumed to have known that, for any particular item to remain as a treaty right, it would have to be included in the finite list of promises contained in the 1871 treaty and the memorandum of outside promises.

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[273] Order in Council, April 30, 1875, NA, RG 10, vol.3621, file 4767, reel C-10108 (ICC Documents, pp. 161–64). Emphasis added.

[274] Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998, p. 18 (ICC Exhibit 5).

[275] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 46–47.

As for the "severe disparity" between the $2 per capita increase in annuities – which counsel for the First Nation conceded to be "a sizeable sum in that day"[276] – and the benefits purportedly being waived, with respect, it must be remembered, as I have already stated, that the term "medical aid" would have had a very limited meaning in the newly created province of Manitoba. Unlike a pre-existing aboriginal right, medical aid came into existence, if at all, only in 1871 and was dependent on Canada for delivery. Moreover, medical aid was completely undefined in 1871 and, as of 1875, when the treaty was amended, there would have been little opportunity for it to have evolved. It was clearly not front and centre during the treaty negotiations, and the parties plainly did not consider it to be a key bargaining point like land or annuities. Medical aid, if it was considered at all, appears to have been an item of much less significance, given that there were few, if any, hospitals or doctors in the region at that time available to either the aboriginal or the non-aboriginal population. Oliver Nelson stated that the members of the Roseau River Band, and even some non-aboriginals, considered Indian medicines superior to those of the white men, and that they agreed to accept medical aid as a treaty term only to satisfy the missionaries and the members of other bands.[277]

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[276] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 45.

[277] Oliver J. Nelson (Ka-no-nace, Ma-ka-wa [Bear Clan]), "Presentation to the Indian Specific Claims Commission on the Roseau River Anishinabe First Nation's Claims," July 14, 1998, p. 13 (ICC Exhibit 5).

Therefore, it is not appropriate to suggest that the parties in 1875 would have considered the Indian signatories to Treaty 1, in giving up their treaty right, if any, to medical aid, to be forgoing the broad range of products and services that exist today. Assuming that medical aid *had* been a treaty term and survived the 1875 amendment, it might then make sense to consider how medical services might have evolved to the present, but in my view those are not the facts before us.

The First Nation also suggests that, by failing to be candid and honest or to disclose that the 1875 amendment "extinguished" a treaty right to medical aid, Canada breached fiduciary duties to the Roseau River Band. However, as I have already stated, in my view it was less than clear that medical aid had been recognized and enforced as a treaty right as of 1871. Given St John's statements to the Pembina bands and to Howe, there may have been no reason for Canada's representatives to think that medical aid had even been *promised* in 1871, much less that the 1875 amendment would have the effect of *terminating* it.

Moreover, I do not believe it is necessary to interpret the 1875 amendment against Canada as the party that drafted it because I do not consider it to be ambiguous. The signatories to Treaty 1 – the Indians and Canada alike – knew that there were disputed terms and that there could be no "satisfaction" until the treaty was "rearranged." For this reason, the amendment was drafted in a *positive* way to enumerate the rights to be conferred by the treaty – from that point constituted by the 1871 document as supplemented by the memorandum of outside promises – rather than by attempting to exhaustively *exclude* those items to which the parties may or may not have agreed in the first place. It is difficult to comprehend how Canada could have agreed on specific promises to be terminated in 1875 without, at the same time, implicitly acknowledging that those promises had been made in 1871.

In addition to seeing nothing confusing in the language of the 1875 amendment, I am aware of no evidence to suggest the presence of further oral promises at that time which might be viewed as altering the terms of the 1875 amendment. By all accounts, the Indians with whom Morris and Provencher met in 1875 to execute the amendment celebrated its signing, and I see no reason to "read it down" or interpret it other than in accordance with its plain meaning.

I do not consider the Crown's approach to drafting the amendment to have been intellectually dishonest or to have lacked the sort of candour and honesty that marks the honourable relationship of a fiduciary to his principal. In my view, Spragge's letters in 1873 did not have the effect of transforming medical aid from a simple outside promise to an implemented and enforceable term of treaty. If medical aid was a treaty term, it would have been a treaty term as of August 3, 1871, and nothing Spragge did in 1873 would have changed that fact. Similarly, the recommendation by the Board of Indian Commissioners in 1874, although stipulating "[a] supply of simple medicines to be provided for each Reserve, and placed in the custody of some suitable person," merely represented a proposal for settlement in which the outside promises were expressly *not* recognized "in their entirety." I do not consider the Board's recommendation to have sufficiently "confirmed" medical aid as a treaty promise such that it could be said, without reservation, that medical aid would no longer have been one of the terms contemplated and terminated by the 1875 amendment. To the contrary, the fact that the Board of Indian Commissioners even referred to medicines implies that, from Canada's perspective at least, the issue of medicines and medical aid did not yet constitute a treaty promise.

In summary, I conclude that the 1875 amendment was implemented to resolve the confusion surrounding the terms of Treaty 1, and that the effect of the amendment was simply to *clarify* the treaty. However, even if Treaty 1 and the circumstances surrounding it are liberally interpreted in a manner in which the Commission might be prepared to find a treaty obligation on Canada's part to provide medical aid, the clear and unambiguous terms of the 1875 amendment, as executed by the Band, nevertheless had the effect of terminating that obligation. Subject to my comments below regarding the manner in which Canada has handled medical aid under the terms of the *Indian Act*, the facts appear to support Canada's contention that it has always treated medical aid as a matter of policy, with those bands having financial means being required to some extent to pay for their own medical care.

Applicability of the Treaty 6 "Medicine Chest" Clause to the Treaty 1 Area

Before turning to the issues arising out of the *Indian Act*, the 1903 surrender, and detrimental reliance, it now remains to determine whether the right to a "medicine chest" under Treaty 6 might be considered to extend beyond the boundaries of Treaty 6 to another treaty area such as Treaty 1.

Perhaps the strongest basis for concluding that the "medicine chest" clause should have extraterritorial application is Lieutenant Governor Archibald's opening statement at the treaty negotiations:

> First, your Great Mother, the Queen, wishes to do justice to all her children alike. She will deal fairly with those of the Setting Sun, just as she would with those of the Rising Sun.... In everything else that the Queen shall do for you, you must understand that she can do for you no more than she has done for her children in the East. If she were to do more for you, that would be unjust to them. She will not do less for you, because you are all her children alike, and she must treat you all alike.[278]

The following day – July 28, 1871 – after much discussion, Archibald asked the assembled Indians whether they were prepared "to accept the terms offered, which were the same as those given Canadian Indians already treated with, viz. a small annuity to each family, to last as long as the sun shines, as much land as is allowed to their brethren in Canada, the reserves to be chosen by the Indians themselves."[279] When the treaty negotiations had not concluded by July 31, Commissioner Simpson remarked that, "[a]s to dealing with those Indians on the same terms as their brethren in the East, not only did they propose to do that, but actually the terms offered were if anything more favorable than any before offered for Indian land by the Government of Canada."[280] Archibald added:

> The Queen wants her red subjects to have a home and offers them one, and offers them, besides, advantages which she does not give to her white subjects. If a white man comes here to cultivate a farm, he gets nothing from the Government, whereas the Indians are not only promised farms, but also get a bounty from the Government. We have offered here terms which has [sic] been accepted by all the Indians in the East, who are ten times as numerous as these here. Is the Indian in this country so

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[278] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, July 27, 1871, as quoted in the *Manitoban*, August 5, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 338–39 (ICC Exhibit 8, tab 3).

[279] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, July 28, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 344–5 (ICC Exhibit 8, tab 3).

[280] Wemyss Simpson, Indian Commissioner, July 31, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 350 (ICC Exhibit 8, tab 3).

> much better than the Indian of the Lake of the Woods, or Lake Superior, that he must receive better terms? Is the Indian of this Province better than the Indian in Minnesota or elsewhere in the States? We are, in fact, offering here better terms than are offered to Canadian Indians, and to those of the United States, and our Indians will not, unless they are foolish, receive [sic] the offer we make them.[281]

Correspondence shows that Archibald and Simpson merely promised the Treaty 1 Chiefs that their people would be treated at least as well as the Indians with whom Canada had already treated in Ontario and points eastward. Although it might be inferred from their comments that *all* Indians were to be treated alike, I cannot believe that Archibald and Simpson would have been prepared to assume an obligation of that sort when they were obviously not in a position to know the future terms to which Canada might commit. Moreover, some treaty terms simply do not translate well from one treaty area to another, given the wide variations in the types of land being ceded, where land was ceded at all, and the disparate needs and desires of the aboriginal parties to the various treaties.

The foregoing comments might suggest that the signatories to later treaties would benefit from the groundwork laid in earlier negotiations. However, the cases also suggest that treaty terms may be limited in their geographic extent. On this point, I note the following comments of Cory J in *Badger* in distinguishing the rights of Indians under various treaties:

> Second, because the various treaties affected by the *NRTA* [*Natural Resources Transfer Agreement*] contain different wording, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another. While some treaties contain express provisions with respect to hunting on private land, others, such as Treaty No. 8, do not.[282]

The implication is that the "medicine chest" clause should not be considered portable from Treaty 6 territory to the Treaty 1 area because of the differences in wording between the two treaties.

Finally, I note that, in *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, the plaintiffs sought to be reimbursed for certain costs of their children's education under the education clause of Treaty 11. However, Tremblay-Lamer J of the Federal Court, Trial Division, held that the benefits conferred by the clause do not extend beyond the boundaries of the treaty area:

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[281] Adams G. Archibald, Lieutenant Governor, Province of Manitoba, July 31, 1871, as quoted in the *Manitoban*, August 12, 1871 (ICC Exhibit 8, tab 4); see also the appendix in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984), 4 *Canadian Journal of Native Studies* 321 at 351 (ICC Exhibit 8, tab 3).

[282] *R. v. Badger*, [1996] 1 SCR 771 at 798, Cory J.

> It is clear from Commissioner Conroy's remarks in the foregoing paragraph that the bands' main concern was to obtain both medical attendance and schools *at each post*. It was certainly not expected that the children would go to school in a distinct area or a different country. The benefits were negotiated by the bands at each post for the benefit of the respective communities.
>
> It can properly be inferred, in my opinion, given the context in which Treaty No. 11 was negotiated, that the schools as well as the medical attendance were required in the geographical area defined in the treaty. This view is reinforced by an overview of the other provisions of Treaty No. 11. The key provisions in the treaty all relate to the geographical boundaries as described therein:
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> | | |
> |---|---|
> | Paragraph 1 | The parties are the Crown and the Indians. |
> | Paragraph 3 | Inhabitants of the territories within the defined area. |
> | Paragraph 5 | Surrender of rights title and privileges to the lands included in the defined area. |
> | Paragraphs 6 and 17 | *The defined area.* |
> | Paragraphs 9, 10 and 11 | Reserves within the boundaries. |
> | Paragraph 19 | Obey the law within the defined area. |
>
> I agree with Counsel for the Defendant that, in view of these provisions, one must conclude that the logical interpretation of the education provision is that benefit would be provided only within the defined area.[283]

I perceive from a review of Treaty 6 a similar intention to restrict the application of its terms to the geographic limits of the territory described in it.

In conclusion, I cannot find that medical aid constituted a treaty right. In so saying, I should not be taken as concluding that some entitlement to medical aid has not grown up over time as a matter of prescriptive right, given Canada's long history of providing medical aid without charge and the resulting expectation among First Nations that such services would continue to be provided at no charge to the Indians. However, the Commission has not been asked to address this question, and I therefore make no further comment on it.

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[283] *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] 2 CNLR 5 at 15. Emphasis added.

Issue 2 Breach of the *Indian Act*

Did the deductions constitute a breach of any statutory provision by Canada?

During the entire period to which this claim relates, payments for medical aid from band funds have been governed by various statutory provisions in force from time to time. As noted, these provisions, which have remained remarkably consistent over the years, first appeared in 1869 with *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42* – the legislation in effect when Treaty 1 was signed. Section 8 of that statute stated:

> **8.** The Superintendent General of Indian Affairs in cases where sick or disabled, or aged and destitute persons are not provided for by the tribe, band or body of Indians of which they are members, may furnish sufficient aid from the funds of each tribe, band or body, for the relief of such sick, disabled, aged or destitute persons.[284]

The 1869 legislation was replaced in 1876 by the *Indian Act*. The new section 73 dealing with medical aid was virtually identical to the former section 8, except that the references to "tribe" and "body of Indians" were subsumed in a broader definition of the term "band."[285] When the Revised Statutes of Canada appeared in 1886, the wording of the new section 74 changed slightly, but the meaning and intent appear to have remained unaltered.[286]

By 1909, when Canada commenced deductions for medical aid from the Roseau River Band's interest account, the *Indian Act* had been subject to further amendment in the 1906 statute. The provision for medical aid, however, continued in much the same form:

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[284] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c. 6, s. 8.

[285] *Indian Act*, SC 1876, c. 18, ss. 3(1) and 73.

[286] *Indian Act*, RSC 1886, c. 43, s. 74.

> **92.** The Superintendent General may ...
>
> (d) whenever sick or disabled, or aged or destitute Indians are not provided for by the band of which they are members, furnish sufficient aid from the funds of the band for the relief of such sick, disabled, aged or destitute Indians.[287]

Section 95(d) of the 1927 *Indian Act*, which still governed when the deductions from Roseau River's interest account ceased in 1934, repeated the 1906 legislation word for word.[288]

In the context of these statutory terms, Roseau River contends that Canada's submissions disclose the government's acceptance of the principle that it must have legislative authority to deal with the funds in a band's trust accounts. However, counsel argues that, although Canada claims to have been authorized by the *Indian Act* to use the Band's trust funds for medical expenses, the legislation does not support such a claim. The implication of this position is that, "[b]ecause these monies were held in trust for the benefit of the Band and could not be used or removed by the Government of Canada except pursuant to legislative authority, Canada acted unlawfully and in breach of the specific terms of the *Indian Act* and amendments thereto."[289] Counsel characterizes Canada's relationship with the First Nation vis-à-vis these funds as "trustee-like," and submits that the onus lies with Canada to justify its actions in dealing with the funds. Ultimately, assuming that Canada is unable to establish legislative authority for the deductions, the First Nation urges the Commission to conclude that those payments were unlawful and should be returned to the First Nation in present-day dollars, together with interest.[290]

Looking specifically at section 92(d) of the 1906 *Indian Act*, counsel submits that it is limited to emergencies and is not intended to provide for the systematic delivery of medical services to a band.[291] Moreover, although Roseau River acknowledges that requiring Indians or bands to pay for their own medical services when they could afford to do so was, in fact, government policy when the deductions were made from the First Nation's interest account between 1909 and 1934, the First Nation denies that this policy was based on or authorized by section 92(d).[292] Relying on *Dreaver*, in which Angers J concluded that a "deaf and dumb" child was not a sick or disabled person within the meaning of section 92(d), the First Nation submits that the manner in which Angers J applied the legislation demonstrates that "the section has specific application on a case-by-case basis to specific circumstances and specific individuals."[293] In the present case, counsel argues that Roseau River was never asked to pay for, nor indeed was even notified of, any of the deducted medical expenses; rather, the deductions were simply made in furtherance of "a policy of paying for medical services and where the money was in the account, deducting it, or paying it straight from the account."[294] Highlighting the "attractive coincidence" between the release of the *Dreaver* decision in 1935 and the termination of deductions from Roseau River's interest account – given that the account's balances remained high even after the deductions stopped[295] – counsel notes that Angers J ordered Canada to repay the sum charged to the Mistawasis Band[296] "based entirely on what is a proper interpretation of Section 92 [and] ... without regard to whether or not there was a treaty right to medical assistance under Treaty No. 6."[297]

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[287] *Indian Act*, RSC 1906, c. 81, s. 92(d).

[288] *Indian Act*, RSC 1927, c. 98, s. 95(d).

[289] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 27 and 34; ICC Transcript, March 25, 1999, pp. 47–48 (Andrew Kelly).

[290] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 35–36; ICC Transcript, March 25, 1999, pp. 48–49 (Andrew Kelly).

Canada takes quite a different view of section 92(d), arguing that the language of the section was clear and unambiguous in stipulating that the government could provide assistance to sick

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[291] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 34–35; ICC Transcript, March 25, 1999, p. 56 (Andrew Kelly).

[292] ICC Transcript, March 25, 1999, pp. 57–58 (Andrew Kelly)

[293] ICC Transcript, March 25, 1999, p. 56 (Andrew Kelly).

[294] ICC Transcript, March 25, 1999, p. 57 (Andrew Kelly).

[295] ICC Transcript, March 25, 1999, pp. 124–25 (Rhys Jones).

[296] ICC Transcript, March 25, 1999, p. 59 (Andrew Kelly).

[297] ICC Transcript, March 25, 1999, p. 126 (Rhys Jones).

Indians.[298] Moreover, counsel adds, the legislation included "no requirement ... to provide notice to a band before, during or after using such funds for medical aid."[299] As for the First Nation's submission that section 92(d) is limited to assisting "individuals" in "emergencies," counsel contends that the word "individual" does not appear in the section; rather, "[w]hat appears is a clear provision that whenever sick Indians are not provided for, sufficient aid from the funds of the Band can be utilized."[300]

Finally, with respect to *Dreaver*, Canada submits that the case merely applied to an "arguable set of facts" in which the Exchequer Court was asked to decide whether the deaf girl was a sick or disabled Indian.[301]

The *Indian Act* sections contain a number of elements that require discussion.

"Sufficient Aid from the Funds of the Band for ... Relief"

Although Canada submits that the "statutory language sets out clearly and with no ambiguity Canada's authority to furnish medical aid to sick Indians,"[302] the relevant sections actually speak in terms of "*sufficient aid* from the funds of the band for the *relief* of such sick, disabled, aged or destitute Indians" and do not use the term "medical aid" at all. With regard to the phrase "sufficient aid from the funds of the band," I have little doubt that the legislative draftsmen meant "band trust money." It is notable, however, that "relief" is intended to assist not just sick Indians but others who, by virtue of being disabled, elderly, or simply too poor, are similarly unable to provide for themselves. The question, then, is whether the legislation really contemplated medical aid at all, or whether it was intended merely to assist Indians incapable of meeting their day-to-day needs for staples such as food, clothing, and shelter.

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[298] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 30; ICC Transcript, March 25, 1999, p. 79 (Robert Winogron).

[299] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 30.

[300] ICC Transcript, March 25, 1999, p. 97 (Robert Winogron).

[301] ICC Transcript, March 25, 1999, p. 108 (Robert Winogron).

[302] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 30.

Black's Law Dictionary, for example, defines relief as "[t]he public or private assistance or support, pecuniary or otherwise, granted to indigent persons,"[303] and the *Canadian Law Dictionary* speaks in terms of "[t]he assistance or support granted to indigent persons pursuant to appropriate enactments."[304] Likewise, the *Canadian Oxford Dictionary* gives one interpretation of relief as "financial and other assistance given to the poor from government funds,"[305] and the *New Oxford Dictionary of English* explains the term to mean "assistance, especially in the form of food, clothing, or money, given to those in special need or difficulty."[306]

Considered in isolation, these definitions project images of government-funded welfare for lower-income members of society. However, the *Indian Act* is more broadly worded to provide assistance to sick, disabled, and aged Indians as well as the poor. In these circumstances, alternative definitions may be more appropriate. The *Canadian Oxford Dictionary* also defines relief in more general terms as "the alleviation of or deliverance from pain, distress, anxiety, etc." and "assistance given to those in special need or difficulty (*disaster relief fund*),"[307] while the *New Oxford Dictionary of English* employs similar terminology, referring to "the alleviation of pain, discomfort, or distress."[308] In *Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (Public Utilities Board)*, Twaddle JA of the Manitoba Court of Appeal distinguished relief in the legal context, where it typically signifies the remedies sought by a party to an action, from relief in a more general sense: "the word [relief] also means 'alleviation of some burden' and 'deliverance from some hardship, burden, or grievance; remedy, redress' (*Oxford Universal Dictionary*, 3rd Ed., revised with addenda 1964) and 'anything that offers a pleasing change' (*Webster's New World Dictionary*, 3rd College

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[303] *Black's Law Dictionary*, 6th ed. (St Paul: West Publishing Co., 1990), 1291–92.

[304] *The Canadian Law Dictionary* (Toronto: Law and Business Publications (Canada) Inc., 1980), 323.

[305] *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998), 1219.

[306] *The New Oxford Dictionary of English* (Oxford: Clarendon, 1998), 1567.

[307] *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998), 1219.

[308] *The New Oxford Dictionary of English* (Oxford: Clarendon, 1998), 1567.

Ed. 1988)."[309] Moreover, in considering the conceptually similar "relief grant" in the context of social assistance legislation, Linden JA on behalf of the Federal Court of Appeal in *Canada (Attorney General) v. Fillion* wrote:

> The phrase "relief grant" ... suggests financial assistance that is given to alleviate hardship. Hardship certainly includes, but is not confined to, circumstances of personal destitution, emergency, or disaster. Hardship may also comprise the broader circumstances of financial or other adversity, not necessarily amounting to destitution, emergency or disaster.[310]

What I take from these sources is that relief can have "specialized" meanings applying in particular circumstances such as law or welfare, but it can also have a broader application. In the present case, in my view, the legislation speaks not of providing Indians with "relief" in a specialized sense, but in the more general sense of providing "sufficient aid from the funds of the band *for the* relief of such sick, disabled, aged or destitute Indians." Accordingly, I see this case as one in which the term "relief" can include relief in a medical sense.

Relief for Emergencies on a Case-by-Case Basis

The First Nation has relied on *Dreaver* as authority for the proposition that section 92(d) of the 1906 *Indian Act* and section 95(d) of the 1927 statute were intended to apply on a case-by-case basis to Indians in emergency situations, and not under a general policy of providing medical services at the expense of the band. A review of the legislation shows that it permitted the Superintendent General to apply band funds for relief purposes "whenever sick or disabled, or aged or destitute Indians *are not provided for by the band* of which they are members."

Assuming that there is no treaty right to medical aid, this provision implies that the *initial* responsibility for assuring the health and welfare of band members – in the late 1800s and early 1900s – rested with the *band*. I consider that the use of the term "band" in this context meant not simply the band's "corporate entity," for want of a better term, but also the group of individuals –

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[309] *Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (Public Utilities Board)* (1995), 102 Man. R (2d) 155 at 159 (CA), Twaddle JA.

[310] *Canada (Attorney General) v. Fillion* (1995), 189 NR 308 at 313 (Fed. CA), Linden JA.

including the sick, disabled, aged, or destitute person – making up the band's membership. The needy Indian contemplated by the legislation had to look first to his own resources and to those of his family and fellow band members. It was only when the *individual's* resources proved insufficient to address his needs that the Crown was permitted to apply the *band's* trust funds to the relief of that individual. As counsel for the First Nation states, section 92(d) "anticipates someone being left out in the cold by a Band that actually has the money to provide support, and in those circumstances, it allows the Government to step in and provide aid or relief from the Band's funds."[311]

Thus, the legislative requirement simply meant that, before a band's trust funds could be employed to pay for medical services, the band had to have insufficient means on hand to assist the needy person; the section did *not* require that relief be made available only in emergency situations. I note, for example, that, in *Dreaver,* Angers J required the repayment of deductions for "care and tuition" made on behalf of Charlotte Sanderson, "who, in 1922, when about 8½ years of age, was placed in a deaf and dumb institute in Manitoba, where she stayed until 1931 or thereabout."[312] Angers J relied solely on the basis that the child, although "deaf and dumb," was not "disabled" within the meaning of the Act. I might have been reluctant, in similar circumstances, to come to the same conclusion regarding the meaning of the term "disabled," but the more significant point is that Angers J said nothing about expenses for "care and tuition" falling outside the scope of the legislation. Clearly, "care and tuition" would not have constituted emergency expenditures, and I am not prepared to conclude that the legislation was so limited.

As for the First Nation's argument that the legislation required expenses to be considered and approved on a case-by-case basis, I am not convinced that *Dreaver*'s implications are so far-reaching. Of course, each expense must meet the requirements of the section, and it is certainly open to a band to challenge the deductions made by Canada in a given case, just as the Mistawasis Band did in *Dreaver*. However, in my view, it was within Canada's legislative discretion to fund a general program of medical care for the members of a given band from the band's trust account, provided the other requirements of the legislation were met.

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[311] ICC Transcript, March 25, 1999, p. 56 (Andrew Kelly).

[312] *Dreaver v. The King* (1935), 5 CNLC 92 at 118 (Ex. Ct), Angers J.

Finally, even if Roseau River is correct in its submission that the expenses must have been for emergency medical purposes assessed on a case-by-case basis, I would have difficulty impugning the deductions in this case. There is no evidence of the Crown having undertaken such case-by-case assessments, but, with the exception of one or two minor expenses for items such as eyeglasses, virtually all the expenses related to drugs, medicines, medical supplies, physicians' attendances, and hospitalization charges. Although the evidence is not entirely clear, it does not appear that any of the expenses charged to Roseau River's interest account related to the annual retainer of $80 paid to the various doctors designated to act as the Band's physicians from time to time. In my view, the physicians' attendance fees, hospitalization charges, and the costs of drugs and medicines must all be regarded as having been paid in response to perceived medical needs at the time, and, as such, they appear to satisfy the tests proposed by the First Nation in any event. This seems particularly true given Inspector Marlatt's account of the Indian agents' somewhat tightfisted approach in limiting doctors' visits to the reserves to circumstances in which the *agents* – rather than the doctors or their patients – considered it "necessary."[313]

Consent

As we have seen, Roseau River contends that Canada deducted payments for medical aid from the Band's interest account without consulting the Band or notifying it of those deductions. The question of whether Canada was obliged to consult or notify the Band before making those deductions arises not only in the context of the statutory provisions but also when considering Canada's fiduciary relationship with the Band.

I have reviewed the legislative context and history of section 92(d) to determine whether the provision contemplates consent, consultation, or notice. In doing so, I have kept in mind the following comments of La Forest J in *Mitchell v. Peguis Indian Band* when he compared the principles involved in the construction of statutes with those relating to the interpretation of treaties:

> I note at the outset that I do not take issue with the principle [in *Nowegijick* and other cases] that treaties and statutes relating to Indians should be liberally

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[313] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 26, 1902, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, p. 67).

> construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.
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> But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533.
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> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.[314]

As the Commission commented in its report on the 1958 enfranchisement claim of the Friends of the Michel Society:

> Thus, the principle is not simply that any construction favouring the Indians ought to be accepted, because we still, of course, demand fidelity to the language and purpose of the statute. Statutes relating to Indians should be construed liberally, having regard for parliamentary intent as embodied in the text....
>
> In [*R. v.*] *Lewis*, the Supreme Court of Canada summarized the canons of interpretation of statutes relating to Indians, beginning with *Nowegijick* and *Mitchell*. The issue in *Lewis* was whether a band's power under the *Indian Act* to make by-laws

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[314] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 142–43, La Forest J.

> for the management of fish "on the reserve" extended to a river immediately adjacent to the reserve. Iacobucci J, for the Court, approached the task by analyzing the wording, context, and purpose of the statutory provision. Making the point that these three elements must be reconciled, he rejected the argument that a broad, purposive construction of the phrase "on the reserve" was justified because the fishery is critical to the economic and cultural well-being of aboriginal people, and the general goal of the *Indian Act* is to protect the "sustaining practices" of aboriginal people. Iacobucci J stated that, although the suggested interpretation "goes further towards achieving Parliament's objective of protecting and maintaining Indian rights, it is not an interpretation supported on the language or goal of the section."[315]
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> In summary, then, while statutes dealing with Indians must be liberally construed, an interpretation that furthers the protection of Indian rights can be accepted only if the language and purpose of the statutory provision can support such an interpretation.[316]

Section 92(d) of the 1906 *Indian Act* and section 95(d) of the 1927 legislation both fell within the parts of the respective statutes entitled "Management of Indian Moneys" in which the powers of the government to deal with band funds were set forth. Section 90 of the 1906 Act, in the same part of the statute, provided for the expenditure of a band's *capital* moneys, and required that such expenditures be made only with the band's consent:

> **90.** The Governor in Council may, *with the consent of a band*, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle for the band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital.[317]

By 1927, in the interests of promoting progress, the section had been broadened to include the purchase of implements and machinery and to permit loans of up to one half of the value of lands held by a band member. Moreover, a new subsection was added to allow the Governor in Council to authorize expenses *without* the band's consent:

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[315] *R. v. Lewis*, [1996] 1 SCR 921 at 958.

[316] Indian Claims Commission, *Friends of the Michel Society Inquiry: 1958 Enfranchisement Claim* (Ottawa, March 1998), reported (1998) 10 ICCP 69 at 93–94.

[317] *Indian Act*, RSC 1906, c. 81, s. 90. Emphasis added.

> **93.** ... 2. In the event of a band refusing to consent to the expenditure of such capital moneys as the Superintendent General may consider advisable for any of the purposes mentioned in subsection one of this section, and it appearing to the Superintendent General that such refusal is detrimental to the progress or welfare of the band, the Governor in Council may, *without the consent of the band*, authorize and direct the expenditure of such capital for such of the said purposes as may be considered reasonable and proper.[318]

By way of contrast, section 92(d) of the 1906 *Indian Act* and section 95(d) of the 1927 version contain no similar stipulations regarding consent or the power to override a refusal of consent.

As we have seen, the first version of section 92(d) arose in 1869, but the Commission has been unable to find anything in the parliamentary *Debates* relating specifically to the genesis of that provision. Section 90 did not appear until 1894, when, as section 139, it was added as an amendment to the 1886 revised statutes. In explaining the rationale for the amendment, the legislative draftsmen wrote:

> Section 139 is intended to remove doubt as to whether the Capital moneys, or part thereof, at the credit of a band can be expended even with the consent of the band and the authority of the Governor in Council. The Department has with such consent and authority been expending Capital for works of a permanent nature; but the point, it appears from the records of the Department, was taken in Council that the Governor in Council had no legal authority for sanctioning such payments, and the following section was drafted pursuant to the Minister's directions.[319]

From these comments, it can be seen that Canada sought to fill a perceived gap in the *Indian Act* by enacting legislation to authorize capital expenditures *already being made* with the approval of both the band and the Governor in Council, but *without* legislative sanction. The matter of requiring the band's consent in such circumstances appears never to have been questioned, given that such consent was solicited even before the legislation requiring it was enacted.

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[318] *Indian Act*, RSC 1927, c. 98, s. 93. Emphasis added.

[319] "Brief on proposed amendments to Indian Act," *Indian Act* Amendments, 1893–94, NA, RG 10, vol. 6808, file 470-2-3, pt 3.

In 1895, Canada revised another provision of the Act – section 70 – dealing with the government's expenditure of band funds. The amendments, in italics, provided that "[t]he Governor in Council ... *may authorize and direct the expenditure of such moneys* [arising from the disposal of Indian lands, and of property held or to be held in trust for Indians, or timber on Indian lands or reserves,] for the construction or repair of *roads, bridges, ditches and watercourses* on such reserves or lands, *for the construction of schools*, and by way of contribution to schools attended by such Indians."[320] The authors of the bill elaborated on the reasons for the amendment by stating:

> *It is necessary that the Governor in Council should have the power to expend the capital of a band in doing such work without the consent of the band*; for otherwise roads leading through reserves might be allowed to get into such a condition as to detrimentally effect [sic] the interests of dwellers in neighboring settlements. And, if the Governor in Council has not power to build and support schools out of such money without the consent of the Indians, it will be in the hands of the Indians to impede the Indian educational policy of the Government.[321]

It can be seen by juxtaposing the commentary with the proposed amendment that the draftsmen considered it unnecessary to include wording such as "without the consent of the band," provided the Governor in Council was given explicit power to authorize and direct the expenditure of capital. This view is in contrast with the addition of subsection (2) to section 93 of the statute in 1927, in which case the words "without the consent of the band" were needed to override the requirement in subsection (1) that the Governor in General should first attempt to obtain the band's consent before spending capital moneys.

In 1897, recognizing that sections 70 and 139 each dealt with expenditures of a band's capital moneys, the government proposed combining the two sections with section 74, the predecessor to section 92(d) of the 1906 Act. Had the amendment proceeded, it would have provided, among other things, as follows (excluding the words in italics):

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[320] *An Act further to amend the Indian Act*, SC 1895, c. 35, s. 2. Emphasis added.

[321] E. Newcombe, Deputy Minister of Justice, to Deputy Superintendent General of Indian Affairs, May 2, 1895, enclosing "Brief on the Bill further to amend the Indian Act," NA, RG 10, vol. 6808, file 470-2-3, pt 4. Emphasis added.

> [t]he Governor in Council ... may authorize and direct the expenditure of such moneys [arising from the disposal of Indian lands, and of property held or to be held in trust for Indians, or timber on Indian lands or reserves,] for the construction or repair of roads, bridges, ditches and watercourses, school or other buildings, or other permanent improvements upon the reserve of the band, or for such works including surveys thereon or in connection therewith as in his opinion will be of permanent value to the band or will when completed properly represent capital *and may upon the refusal of a Band to sanction the same authorize such expenditure from Capital as will be of permanent value to the Band, or will when completed, properly represent Capital*, or for the purchase of cattle for the band, or by way of contribution to schools attended by its children, and with the consent of the band for purchase of land as a reserve for the band or as an addition to its reserve; and the Superintendent General may, whenever sick or disabled, or aged or destitute Indians are not provided for by the band of which they are members, furnish sufficient aid from the funds of the band for the relief of such sick, disabled, aged or destitute Indians; and he may at any time authorize expenditure for general purposes from the funds of the band of any sum not to exceed $500 when in his opinion it is in the best interests of the band to do so.[322]

Another version of this proposed amendment – prepared by Duncan Campbell Scott as Secretary of the department on November 15, 1897 – would have added the italicized words and, in substitution for the closing clause of the foregoing provision, language to the effect that, "[f]or general purposes of expenditure no sum under the amount of fifteen hundred dollars, standing at the credit of any Indian Band in the Books of the Department of Indian Affairs, shall be accounted as Capital, and expenditure from such sums under the amount of fifteen hundred [dollars] may be authorized by the Superintendent General for the benefit and in the interest of the Bands owning such sums." In commenting on the first of these proposals, the legislative draftsman wrote:

> There seems an unnecessary distinction between the nature of the expenditure which under Section 70 may be authorized by the Governor in Council without consent of the band, and that which under Section 139, requires such consent, the necessity for

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[322] The first proposed amendment is found in "Memorandum for the Minister in re Proposed Amendment of the Indian Act," undated, NA, RG 10, vol. 6809, file 470-2-3, pt 4, pp. 9 ff. The second proposal is located in D.C. Scott, Secretary, "Suggestions as to Amendments to the Indian Act," November 15, 1897, NA, RG 10, vol. 6809, file 470-2-3, pt 4, pp. 2–3.

> obtaining which might result in Indians blocking important works, required in the best interests of the band. It is proposed therefore to amalgamate these sections, and empower the Governor General in Council to authorize *without the Band's consent* expenditure of capital on permanent improvements or other works which in his opinion will be of permanent value to the band, or when completed properly represent capital, also on surveys and other as well as school buildings.[323]

Scott's commentary on the second proposal also addressed the provision for needy Indians:

> The reasons for these suggestions are briefly as follows. The occasion might arise when most important improvements of a public character on an Indian reserve might be opposed and altogether prevented by the Indians. In such a case I think the Governor General in Council should have power to authorize the expenditure without the consent of the Band. I think it advisable to submit expenditures for all purposes except those specially mentioned in the clause to the Band, as it will then be evident that the Superintendent General or the Governor in Council do not wish to act in an arbitrary way; but in cases of special need, where a Band refuses to vote money in its own interests the Governor in Council should have power to take it without their consent.
>
> *The only cases in which the clause provides for action by the Superintendent General without the consent of his Excellency in Council or the Indians are the provision of relief and aid for sick and destitute Indians* and the expenditure of amounts for general purposes out of Indian funds not aggregating more than $1500.00. *The reason for the 1st authority is self-evident.* [T]he reason for the 2nd is that the Department is constantly receiving from various sources, principally from Manitoba and the N.W.T. small amounts for deposit for the credit of Indian Bands. It is desirable to spend these amounts from time to time in the purchase of implements and cattle, or in some other way conducive to the general welfare of the Band. At present where the amount arises from timber or any source which represents Capital, the amount cannot be spent without the consent of the Band, and the authority of His Excellency in Council. It would greatly simplify matters if the Department were able to spend such sums for the improvement of the Indians without such routine, and fixing the amount over and above which the sums standing at the credit of Indian Band shall be considered Capital would bring all amounts under that figure within the general usage of the Department, and they could then be spent with Departmental authority.[324]

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[323] "Memorandum for the Minister in re Proposed Amendment of the Indian Act," undated, NA, RG 10, vol. 6809, file 470-2-3, pt 4, pp. 9 ff. Emphasis added.

[324] D.C. Scott, Secretary, "Suggestions as to Amendments to the Indian Act," November 15, 1897, NA, RG 10, vol. 6809, file 470-2-3, pt 4, pp. 3–4. Emphasis added.

Although these legislative proposals never received parliamentary approval, it seems evident from the tone of the comments that the government differentiated expenditures on certain capital items from expenditures to provide for needy band members. Clearly, the enumerated capital expenditures required band approval unless the Governor in Council authorized a band's refusal to be overridden, but just as clearly Parliament never intended to require a band's consent for expenditures on relief of sick, disabled, aged, or destitute Indians. Indeed, Scott considered it "self-evident" that approval should not be required, presumably given that, in such cases, the health and welfare of the band member – and possibly the need for immediate action – were the primary concerns.

In conclusion, although the interpretation suggested by Roseau River for section 92(d) of the 1906 *Indian Act* and the succeeding section 95(d) favours the First Nation's position in this case, care must be taken, as La Forest J directs in *Mitchell v. Peguis Indian Band*, to reconcile the interpretation of the legislation with the policy that the statute seeks to promote. Moreover, to use the words of Iacobucci J in *Lewis*, I must also ensure that my interpretation is supported by the language and purpose of the legislation.

In my view, Parliament's intent in enacting the legislation was to provide for sick, disabled, aged, and destitute band members out of the band's trust funds when the band was otherwise unable to provide for those band members out of its resources on hand. It is apparent that, when considered in its historical context, the legislation did not require the Superintendent General to seek a band's consent to employ the band's trust funds for such purposes.

In reaching this result, it is important to point out that Canada did not misappropriate band funds for non-band purposes: the expenses challenged in this case were applied strictly for the care of sick members of the Roseau River Band. For these reasons it is difficult to conclude other than that the deductions were in the best interests of the Band – and, without doubt, in the interests of those sick band members for whom the expenses were incurred. Accordingly, I find that the deductions were authorized by, and consistent with the intent of, the legislation.

That being said, however, I am not without concern regarding the manner in which Canada purported to exercise its statutory powers. In particular, I would note that, although section 92(d) of the 1906 *Indian Act* and section 95(d) of the succeeding statute did not require a band's *consent* to expenditures for medical aid from its trust account, the deductions in this case were made without even providing *notice* to the Roseau River Band; members of the First Nation did not discover the deductions until the early 1980s, when they inadvertently stumbled across the medical aid expenses from their trust accounts while researching their claim arising from the 1903 surrender of reserve land. Although the deductions were recorded in the public accounts, those accounts were never brought specifically to the First Nation's attention, nor do I understand them to have been readily available to band members at the time. Even if they had been readily available, band members had no reason to ask to see records of the medical expenses being charged to their trust accounts if they had no inkling that such deductions were being made in the first place.

There are other concerns as well. As I will discuss further below, there is evidence to suggest that, while Canada has often articulated a policy – apparently based on the legislation – of making bands with financial resources pay for their own medical expenses, the federal government has not consistently applied that policy at all times or with regard to all bands. In most cases, Canada appears to have paid for medical aid without charge to the bands, and *still* pays medical expenses for even those Indians who appear able to pay their own way. Moreover, Canada seems to have been reluctant to advise bands that, from the federal government's perspective, medical services have been provided not as a treaty right, but as a matter of policy. Even assuming that Canada is correct in this view, this approach to the delivery and communication of government policy has fostered an environment reinforcing the Indian position that medical aid is a treaty right to be provided by the government at no cost to bands or the aboriginal population.

I will address these concerns more fully later in my reasons. First, I must consider the First Nation's arguments that the deductions constituted a breach of the terms of the 1903 surrender or that, in the alternative, the deductions were improper, given that the Band had come to rely on government-funded medical care to the detriment of its own traditional healing practices.

Issue 3 Breach of the 1903 Surrender

Did Canada breach the terms of the 1903 surrender by deducting amounts for medical aid from the Band's interest account?

From a review of the trust records, it seems evident that the primary source of revenue in Roseau River's interest account from 1906 to 1945 was interest on the proceeds of the 1903 surrender of a portion of IR 2. Apart from the medical aid claim arising in this inquiry, another issue raised by the First Nation in relation to the surrender is whether the surrender conformed with the technical requirements of the *Indian Act* or gave rise, by some other means, to an outstanding lawful obligation by Canada to the First Nation.

For the purposes of the present inquiry, the Commission has not been asked to rule on the validity or lawfulness of the 1903 surrender, and I will refrain from doing so. In the meantime, to enable me to consider whether the scope of the surrender would have permitted the deductions for medical aid, I must proceed on the *assumption* that the surrender was valid.

As we have seen, Roseau River surrendered reserve land in 1903 on the following terms:

> AND WE, the said Chief and Principal men of the said Roseau River Bands of Indians do, on behalf of our people and for ourselves, *hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the capital, and interest that may accrue from said capital secured from the sale of lands herein surrendered.*[325]

In 1906, Superintendent General Frank Oliver directed that, to fulfill an implied promise made during the surrender negotiations, all future interest accruals on unpaid sale proceeds from the surrendered lands were to be deposited in the Band's interest account for distribution to band members rather than capitalized.

From Roseau River's perspective, the funds in the Band's interest account were primarily interest accruals arising from the sale of the 12 square miles of reserve land surrendered in 1903.[326] To the extent that the surrender was valid, the First Nation argues that such validity still does not signify the Band's consent to Crown representatives using funds from the interest account to do with "as they wish ... including, using same to pay for the medical expenses of the Band."[327] Indeed, the First Nation contends that funding medical services using cash from the interest account represented a breach of the surrender, for three reasons: first, there were no *written* surrender terms *expressly* authorizing the use of surrender proceeds for medical expenses; second, to the extent that the surrender involved *oral* terms, Canada did not even argue that there was an oral term allowing surrender proceeds to be used for such purposes; and, third, the legislation of the day did not permit Canada to spend interest on the surrender proceeds on medical services.[328]

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[325] Surrender of portion of IR 2A, January 30, 1903, DIAND, Indian Lands Registry, Instrument R5294 (ICC Exhibit 4, pp. 70–71); see also *Indian Treaties and Surrenders*, vol. 3 (Ottawa: King's Printer, 1905–12; reprinted Edmonton: Fifth House Publishers, 1993), 375–76 (ICC Documents, pp. 238–39).

[326] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 59.

[327] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 60.

Canada responds that the broad language of the surrender states, in clear and unambiguous terms, that the Band prospectively ratified and confirmed "whatever the said Government may do, or cause to be lawfully done, in connection with the capital, and interest that may accrue from said capital secured from the sale of lands herein surrendered." Counsel contends that Canada was given an extremely wide discretion as to how it might employ the proceeds of surrender, adding, with the support of Public History Inc., that "there is absolutely nothing in the surrender that prohibits anything, much less deduction of amounts for medical assistance."[329] Counsel also argues that the First Nation has failed to demonstrate that the proceeds of the surrender were, in fact, the funds from which the government drew for medical aid – the Public History Inc. report was inconclusive on this point – but that, even if they were, the deductions were authorized by the clear language of the surrender.[330]

The First Nation replies that, while there was some money in the Band's interest account before the surrender, by the time the deductions commenced in 1909, most of the money in the account would have come from the surrender.[331] Although acknowledging that it cannot confirm whether the surrender proceeds formed the source of the deductions for medical aid – and that it cannot even differentiate among the sources of the funds in its trust account – the First Nation counters that, owing to Canada's position as fiduciary vis-à-vis the First Nation and its trust funds, the responsibility for this inability to account for the commingled funds lies with Canada. In counsel's submission,

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[328] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 60.

[329] ICC Transcript, March 25, 1999, pp. 79, 95–96, and 104–5 (Robert Winogron); Public History Inc., "Roseau River First Nation Medical Aid Claim, 1902–1945: Historical Report," May 12, 1998, p. 17 (ICC Exhibit 4).

[330] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 24.

[331] ICC Transcript, March 25, 1999, p. 62 (Rhys Jones).

> it is the commingling that creates the situation out of which we say the Government of Canada no longer has the right to define its management or expenditure of money in the Band's capital account just through the standard imposed by Section 92 of the *Indian Act*. It must now comport itself in such a way as to discharge the duties of a fiduciary in relation to that money, and that requires disclosure with respect to which there is no evidence on the record.[332]

In other words, the First Nation contends that, if Canada cannot identify the various sources of the funds in the Band's trust account, then, as a fiduciary dealing with those funds, Canada is impressed with the higher standard of conduct required of a fiduciary, rather than the less onerous standard contemplated by section 92(d) of the *Indian Act*.[333] That higher standard is derived from *Guerin v. The Queen*,[334] which, in counsel's submission, establishes that, after the use and benefit of reserve land has been released to the Crown, Canada, as a fiduciary, is subject to "an enforceable duty to deal with the proceeds of sale or lease in strict observance to the nature of the arrangement between the Band and the Government in the procuring of the surrender."[335] Alternatively, even if the terms of the surrender ratified and confirmed whatever Canada "may do, or cause to be *lawfully* done, in connection with the capital, and interest that may accrue from said capital secured from the sale of lands herein surrendered," the First Nation asserts that Canada's actions still had to be *lawful*. As counsel stated:

> But in the surrender itself, it says that the Roseau people are only going to ratify and confirm what the Government of Canada may do or cause to be lawfully done. So it takes us right back to the issue of whether or not deductions from the account under Section 92 were lawful or not.

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[332] ICC Transcript, March 25, 1999, p. 67 (Rhys Jones).

[333] ICC Transcript, March 25, 1999, pp. 64–65 (Rhys Jones).

[334] *Guerin v. The Queen*, [1984] 2 SCR 335.

[335] ICC Transcript, March 25, 1999, p. 63 (Rhys Jones).

> If indeed it is the understanding of the Commissioners that Section 92 is a very specific and narrow authority for the Government to step in and make deductions in situations of extremis and is not a general authority to take money out in pursuit of its own policy to provide medical assistance to all Indians in the country, then we have also answered the question of whether or not the 1903 surrender was breached. Because if it's not statutorily permitted, it also therefore constitutes a violation of the surrender, because the only thing the Roseau Indians are permitting them to do with it is something that is otherwise lawful.[336]

In reply, Canada submits that, even if a fiduciary duty did arise when the funds were commingled, that fact does not relieve the First Nation of the burden of establishingthat the funds deducted for medical aid purposes were proceeds of the surrender, something even the Public History Inc. report was unable to resolve.[337]

The Commission has undertaken a thorough review of the interest account ledgers, and the results of this review are set forth in the table attached as Appendix B to this report. It can be seen from this table that, in each year during the period when deductions for medical aid were made from the interest account, interest represented the account's largest source of income. Although it appears that, over the 43-year period covered by the table, there may have been sufficient "other" sources of revenue to fund the medical expenses incurred during that same period, such revenues were not sufficient to cover medical *and* "other" expenses, and, in four fiscal years, medical expenses alone exceeded "other" (non-interest) revenues. For these reasons, I conclude that interest on surrender proceeds was the primary source of the deductions for medical aid.

Having assumed that the surrender was valid and lawful, and having concluded that the medical aid deductions were funded largely from interest on the proceeds of the 1903 surrender, I must next address the scope of Canada's authority to make the deductions under the terms of the surrender. Specifically, I must assess the ambit of the words "whatever the said Government may do, or cause to be lawfully done, in connection with the capital, and interest that may accrue from said capital secured from the sale of lands herein surrendered."

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[336] ICC Transcript, March 25, 1999, pp. 132–33 (Rhys Jones).

[337] ICC Transcript, March 25, 1999, p. 104 (Rhys Jones).

The *Dreaver* case provides a useful starting point for my analysis. In *Dreaver*, under two separate deeds of surrender dated August 8, 1919, the Mistawasis Band agreed to surrender a total of 16,548 acres of reserve land for sale at a combined price of $198,000 to such persons and on such terms as Canada might deem most conducive to the welfare of the Band. After the deduction of management fees, the sale proceeds were to be distributed in the following manner:

- $150 to be paid to each band member at the time of signing the surrender;
- 50 per cent of the sale proceeds to be deposited on account of capital to be used for the benefit of the Band by the Superintendent General of Indian Affairs;
- the remaining sale proceeds to be "placed to the credit of an account to be used at the discretion" of the Superintendent General *to provide rations to old, sick, and destitute band members*; to provide suitable houses, furniture, and clothing for old and destitute band members; to acquire houses, animals, and implements for young band members who might start farming; to provide compensation to any band member owning buildings or other improvements on the surrendered land; and to make interest-free loans to returning Indian soldiers to acquire homes, stables, animals, or implements; and
- interest accruing on all funds held in trust by the department for the Band to be distributed annually on or about February 1.

The evidence demonstrated that, among other things, Canada had used the Band's trust funds to cover the salary of the Band's farm instructor as well as police expenses for arresting trespassers and transporting prisoners to jail. In considering whether Canada should be ordered to repay these amounts to the Band, Angers J held that, although the 1906 Act "confers on the Governor General in Council very broad powers with regard to the investment of monies arising from the disposal of Indian lands ... it is subordinate in each case to the terms of the deed of surrender." Nevertheless, he concluded that the challenged expenses were not authorized by the *Indian Act*, the treaty, or the surrenders, and he directed Canada to repay those amounts to the Band.[338] He further held that the terms of the 1919 surrenders were "quite explicit and indicate[d] clearly the purposes for which the funds [were] to be used; they contain[ed] no stipulation whatever concerning the payment of the salary of a stockman, farm instructor or farmer.'[339] Indeed, the department's own correspondence in 1928 suggested that it was not convinced that it was entitled to deduct the farm instructor's salary and intended to discontinue the practice.

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[338] *Dreaver v. The King* (1935), 5 CNLC 92 at 117 (Ex. Ct), Angers J.

In *Dreaver*, the surrenders specifically provided for "rations" for old, sick, and destitute band members, whereas the present surrender makes no such reference. Presumably because the surrenders in *Dreaver* referred only to "rations," whereas the *Indian Act* used the term "relief," Angers J considered that the provisions in the 1919 surrenders were "narrower" and, consequently, afforded less flexibility to the Crown than section 92(d).[340] I agree. However, although the language of the surrender in the case before me makes no *express* reference to providing assistance to the sick, I see nothing in it to narrow the broad discretion conferred on the government in the earlier words of the surrender to apply the capital and interest arising from the sale of the surrendered lands. In my view, the present surrender is much broader and provides even *more* flexibility to the Crown than either section 92(d) or the surrender in *Dreaver*.

However, I must also have regard to the decision of the Supreme Court of Canada in *Guerin*,[341] a case in which reserve land was surrendered to the Crown "to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people." The surrender carried on to provide that the "Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof." It can be seen that the language of the *Guerin* surrender was similar to that in the present case, subject to one difference: whereas the words in *Guerin* were directed to Canada's discretion to manage the surrendered land for *leasing* purposes, under the Roseau River surrender the promise by the Chiefs and principal men to ratify and confirm "whatever the said Government may do, or cause to be lawfully done" related to "the *capital, and interest* that may accrue from said capital secured from the *sale* of lands herein surrendered." In my view, this difference is not significant. The Crown's broad discretion in the present case relates to the capital and interest *arising* from the sale of the surrendered land and held by Roseau River in *substitution* for that land, so the same principles should apply.

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[339] *Dreaver v. The King* (1935), 5 CNLC 92 at 117 (Ex. Ct), Angers J.

[340] *Dreaver v. The King* (1935), 5 CNLC 92 at 120 (Ex. Ct), Angers J.

[341] *Guerin v. The Queen* [1984] 2 SCR 355 at 369, Dickson, CJ.

In *Guerin*, Dickson CJ held:

> [T]he Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. *The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act.* After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[342]

In the context of these principles, I must consider the written words of the surrender document and any oral representations at the time of the surrender to determine what the Crown was permitted to do with interest accruals on the surrender proceeds. With regard to the surrender document, it will be recalled that, in addition to the broad language in which the Chiefs and principal men of the Roseau River Band ratified and confirmed "whatever the said Government may do, or cause lawfully to be done, in connection with the capital, and interest that may accrue from said capital secured from the sale of lands herein surrendered," the surrender stated:

> It is further understood and agreed that a survey shall be made of the lands surrendered and the lands sold at the earliest possible date. It is further understood and agreed that one tenth of the amount realized from said sale shall be expended [as] soon as available for such articles or commodities as the Indians may desire and the Department approves of. Any advances made at this time, or at any time subsequent to the sale of said land [are] to be repaid from the 10% before mentioned. It is further agreed that the Department shall purchase for the Bands two sections of land adjacent

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[342] *Guerin v. The Queen*, [1984] 2 SCR 335 at 388–89, Dickson CJ. Emphasis added.

> to the reserve known as Reserve No. 2a, or Roseau Rapids, said lands to be purchased as soon as funds are available.[343]

As for oral representations at the time of the surrender, elder Oliver Nelson provided the Commission with evidence regarding the manner in which the proceedsof sale of the surrendered land – a sum totalling $99,822.50, according to Nelson – and interest on those proceeds would be allocated:

> The interest payments would be expended in the following manner; (the annual interest rates in 1903 was [sic] five percent.)
>
> I remember very distinctly my grandfather Okima telling us, his grandchildren, that out of $5,000.00, interest that would be accrued from the capital,
>
> i. $2,000.00 would be taken and put back towards the principal for the future generations, or 40 percent of the earned interest would be returned to capital to increase the principal for future generations and accommodate the increased populations anticipated.
>
> ii. $3,000.00 or 60 percent of earned interest would be distributed to the band membership annually. With a band population of 196 band members back in 1909, distribution would have amounted to 3,000 divided by 196, $15.30 per year per man and woman and child. You will hear later on today, a lot of elders still remember on Treaty Payment Day, every man, woman and child here in Roseau used to get $20.00; $5.00 Treaty money and $15.00 interest money.
>
> 4. Once the payment of these lands was made, the band would get 10 percent of the proceeds of the sale or $9,982.25. It would be used to purchase supplies for the band and the balance would be distributed to band members.
>
> 5. A portion of the proceeds of the sale would be used to purchase two sections of the land at the Roseau Rapids.
>
> 6. No other conditions were attached to the proceeds of this land sale.
>
> 7. With these sale conditions Roseau River Indians would be well off and be able to purchase farm equipment, farm animals and seed for their farms and would never be in want again.
>
> 8. No other deductions would ever be taken from this account in Ottawa, other than for the following as offered by the department;
>
> i. 10 percent from the proceeds of the sale of these lands would be distributed immediately after the auction.

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[343] Surrender of portion of IR 2A, January 30, 1903, DIAND, Indian Lands Registry, Instrument R5294 (ICC Exhibit 4, pp. 70–71); see also *Indian Treaties and Surrenders*, vol. 3 (Ottawa: King's Printer, 1905–12; reprinted Edmonton: Fifth House Publishers, 1993), 375–76 (ICC Documents, pp. 238–39).

> ii. Annually the earned interest would be distributed on the following basis, 40 percent to capital and 60 percent distributed to band members. No other conditions were ever agreed to.[344]

Nelson's evidence is consistent with the written terms of the surrender with regard to the immediate application of one-tenth of the sale proceeds to the purchase of articles or commodities for the Band, although the written form of the surrender says nothing in relation to the distribution to band members of the balance of the 10 per cent not so spent. However, the letter from S.R. Marlatt, the Inspector of Indian Agencies, to Commissioner Laird confirms Nelson's remarks to some extent:

> My idea of the expenditure of the money [the 10 per cent of the sale proceeds] is as follows: – As the lands were held in common by the Indian's [sic] all members of the bands are justly entitled to share equally in the distribution. I would take them up by families as is done at the annuity payments giving to each member through the head of the family the share entitled to on a per capata [sic] basis, I would give them say $3.00 per head in cash, the balance I would expend for them in such articles or commodities as could be mutually agreed upon and that would be of greatest benefit to them. Any outstanding legitimate debts they owe should be paid on obtaining the consent of the debtor. In the case of old men and women, orphans, adult cripples, and invalids unable to provide for themselves I would make them monthly or quarterly allowances in supplies to the amount of their share. I would try to retain about $1000.00 to be expended later, and before their interest account will be available, probably next March or April when they are sure to be hard up.[345]

The surrender document further corroborates Nelson's account of the use of sale proceeds to purchase two sections of land near IR 2A at Roseau Rapids. Moreover, although the surrender itself says nothing of annual distributions of interest, Nelson's evidence regarding such distributions brings to mind Superintendent General Frank Oliver's advice to the Governor General in Council in 1906 relating to Marlatt's assertion to the Indians during the surrender negotiations that a "considerable amount of interest [would be] available for distribution" following the settlement.

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[344] ICC Transcript, July 14, 1998, pp. 66–68 (Oliver Nelson).

[345] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, June 19, 1903, NA, RG 10, vol. 3565, file 82, pt 29, reel C-10100 (ICC Exhibit 4, pp. 73–74).

Oliver commented that Marlatt's statement "was in the nature of a promise that such interest would be forthcoming and would be distributed annually in the future."[346] In the days immediately following the surrender, Marlatt himself had advised J.D. McLean, the Secretary of Indian Affairs, of his trust that "the terms of surrender will be closely observed, I had very considerable difficulty in getting it, and only after repeated promises that the Department would carry out the terms of agreement *to the letter*."[347] It was in the wake of Marlatt's oral promise regarding interest distributions that Oliver recommended the direction of interest accruals to the Band's interest account to permit this promise to be implemented.

There are also some inconsistencies between the First Nation's version of events and the historical documents on record. For example, according to counsel for the First Nation:

> Some hint of the terms and conditions necessary to persuade the Indians to surrender after years of firm refusals can be found in the correspondence of Marlatt following the surrender. Marlatt indicated in various correspondence that he had great difficulty in obtaining the surrender, that he promised the Indians $500.00 for supplies to be available immediately after the surrender, that 10% of the proceeds of the land sale would be available immediately after the sale, *none of which can be found in the surrender document itself.*[348]

On these points, Marlatt wrote:

> I experienced very considerable difficulty in getting the surrender, and only succeeded after promising to advance the sum of $500.00 [as] soon as the surrender was signed, with the understanding that it would be deducted from the 10% before mentioned.

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[346] Frank Oliver, Superintendent General of Indian Affairs, to Governor General in Council, February 21, 1906, NA, RG 10, vol. 3731, file 26306-2, reel C-10127 (ICC Exhibit 4, p. 88).

[347] S.R. Marlatt, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, February 2, 1903, NA, RG 10, vol. 3730, file 26306-1, as referred to in a report for the Commission's inquiry into the 1903 surrender: Public History Inc., "Roseau River Indian Reserve No. 2 1903 Surrender Claim: Historical Report," September 12, 1997, p. 27, footnote 126. Emphasis added.

[348] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 26–27. Emphasis added.

> The Bands already have several hundred dollars to their credit of capital funds, I would suggest that these funds be borrowed from to pay the accounts, and the amount recredited [as] soon as funds are available from the sale of lands.[349]

This document clearly confirms the difficulty Marlatt experienced in obtaining the surrender. However, although counsel for the First Nation submits that the surrender document says nothing about $500 and 10 per cent of the sale proceeds being made available immediately after the surrender, that document, in fact, plainly stipulates that "one tenth of the amount realized from said sales shall be expended [as] soon as available for such articles or commodities as the Indians may desire and the Department approves of," and that "[a]ny advances made at this time, or at any time subsequent to the sale to be repaid from the 10% before mentioned." With regard to the immediate expenditure of 10 per cent of the sale proceeds and the advance of $500, it appears, in my view, that the surrender document contemplates precisely what counsel for the First Nation claims it does *not*.

Oliver Nelson also suggested that the sale proceeds were to have been $99,822.50, whereas, according to Frank Oliver, the figure was $82,000. In either event, at an interest rate of 5 per cent, neither figure would have generated annual interest proceeds of $5,000 after the initial expenditure of 10 per cent of the sale proceeds. Moreover, although Nelson referred to annual interest distributions of $3,000, or roughly $15 per band member, representing 60 per cent of the Band's interest income each year, there is no record of any systematic allocation of this proportion of the interest proceeds to band members each year. My review of the Band's annual interest account ledgers indicates that the proportion of interest distributions to overall expenditures from the account varied widely, ranging in different years from zero to 100 per cent, with an average from 1902 to 1945 of 75 per cent. Similarly, once interest distributions commenced in the 1905–6 fiscal year and the Band's interest account began consistently to show credit balances, the ratio of interest expenditures to interest revenues in particular years ranged from a low of 45 per cent to a high of 215 per cent – including a total of eight years in which interest distributions *exceeded* interest revenues – with an overall distribution average of 85 per cent over that 40-year period. Band members may have received interest distributions of $15 per person, but, in many years, based on a population of

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[349] S.R. Marlatt, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 25, 1903, NA, RG 10, vol. 3731, file 26306-2.

196, distributions of that size would have represented more than 60 per cent of the Band's interest income and, likewise, more than 60 per cent of overall expenditures from the interest account.

Neither the written surrender nor Oliver's 1906 letter to the Governor General in Council makes any reference to splitting the interest proceeds between interest distributions and contributions to capital in the 60/40 ratio alleged by Nelson. Oliver *did* mention, however, that directing interest accruals to the Band's interest account represented a *departure* from the usual practice of capitalizing both principal and interest to build up "capital which might from time to time, be used in permanent improvements on the reserves [that] would better conserve the interests of those interested in the fund."[350] Therefore, although it seems clear that Nelson's evidence is somewhat consistent with the *general* departmental practice of capitalizing interest at the time of the surrender, that evidence contradicts Oliver's recommendation in the *specific* circumstances of the Roseau River Band that the interest proceeds be credited to the interest account to satisfy Marlatt's promise regarding interest distributions. Nevertheless, it is also clear that, if Oliver's intent was to distribute *all* interest income to band members, interest distributions never did match interest income precisely in anyone year, and, during the entire 1902–45 period, land-related interest income totalled $162,156.85, whereas interest distributions were $137,556.96.

These contradictions raise the question of how the Commission should proceed where there is limited contemporary documentation disclosing how interest income was to be allocated, but where there *is* oral testimony regarding the recollections of now-deceased band members who have passed on their memories of events to their children and grandchildren. I am mindful of the decision of the Supreme Court in *Delgamuukw v. British Columbia*,[351] in which Chief Justice Lamer stated:

> Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of [that] culture": Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary

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[350] Frank Oliver, Superintendent General of Indian Affairs, to Governor General in Council, February 21, 1906, NA, RG 10, vol. 3731, file 26306-2, reel C-10127 (ICC Exhibit 4, p. 89).

[351] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

> Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations." The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.
>
> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[352]

Although the Commission has accepted and applied the above principle in previous inquiries, I also take the view that the "equal footing" referred to by the former Chief Justice does not amount to special status, nor does it have the effect of assigning greater weight to oral history than to any other evidence. Accordingly, any oral evidence submitted in this inquiry should be weighed and considered along with all the other evidence in the determination of this issue.

The question in this case is whether one of the oral terms of the surrender was that the Band's interest income should be divided, with two-thirds distributed to band members and the remaining one-third deposited on account of capital. I find that the evidence does not support such a conclusion.

I consider it significant that Canada's representatives at the time of the surrender frankly acknowledged the existence of the oral term regarding the annual distribution of interest to band members and put mechanisms in place to implement that term. Marlatt expressed his trust that, given the difficulty he had experienced in obtaining the surrender, its terms would be observed "to the letter." I see no reason why, if there had been a similar undertaking to allocate interest proceeds between distributions to band members and deposits to capital, Canada would have denied that such a term existed. The division of interest income between distributions and capital seems no more or less onerous than allocating *all* of it to capital, as was Canada's usual course. I find that Canada's eventual distribution of 85 per cent of the interest income to band members was consistent with, first, Marlatt's promise that "a *considerable* amount of interest [would be] available for distribution" and, second, Oliver's report that "the Department [finding] itself in the position of being unable to make good the statement made at the time of the surrender ... the Indians of the Rosseau [sic] River are, therefore, in a state of dissatisfaction and threaten to re-possess themselves of the lands, which have been sold, unless the estimated payments of interest are forthcoming."[353] The evidence suggests that, first and foremost, band members wanted their distributions of interest money.

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[352] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1068–69, Lamer CJ.

I turn now to the First Nation's argument that, even if Canada's actions satisfied the test required by section 92(d) of the *Indian Act*, the use of commingled interest accruals on the proceeds of surrender failed to meet the standard of conduct required of a fiduciary. A fiduciary's responsibility is to manage his principal's assets in the way that a prudent man would manage his own affairs. However, Canada's role as a fiduciary does not mean that, because it would be most advantageous to the Band, Canada should fund medical aid out of its own pocket rather than from the Band's resources. In this case, while it is true that Canada did not expressly advise the Band that the expenses for medical aid would be funded from the Band's own interest account, I see no evidence of conflicting interests, secret profits, or any conduct by Canada to suggest that it breached any duty of loyalty to the Band. Moreover, I find it difficult to see how expenses for the personal well-being of individual band members can be said to have been incurred for purposes other than the best interests of the Band.

In summary, I conclude that the written surrender, as supplemented by oral promises made at the time, provided for Canada's annual distribution of the lion's share of the Band's interest revenues to band members. This was, in fact, done. I further conclude that the surrender conferred a broad discretion on Canada that permitted the federal government to make a wide range of expenditures, including medical care, on the Band's behalf. Further, even though the surrender does not say anything about the expenditures having to be made in the best interests of the Band, I conclude that the deductions for medical aid would satisfy this requirement in any event. In short, the evidence does not support the First Nation's contention that Canada failed to deal with the surrender proceeds "in strict observance of the nature of the arrangement between the Band and the Government in the procuring of the surrender."

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[353] Frank Oliver, Superintendent General of Indian Affairs, to Governor General in Council, February 21, 1906, NA, RG 10, vol. 3731, file 26306-2, reel C-10127 (ICC Exhibit 4, pp. 88–90).

I would conclude that Canada did not breach the terms of the 1903 surrender or any fiduciary obligations arising from it when making the deductions for medical aid.

Issue 4 Detrimental Reliance

> **Did Canada induce Roseau River to rely on free medical aid to the detriment of the Band's own traditional healing methods, and, if so, does Canada owe Roseau River a lawful obligation for unilaterally withdrawing medical aid by charging medical expenses to the Band's trust account from 1909 to 1934?**

Roseau River argues that, even if medical aid did not amount to a *treaty* promise, the fact that the government provided medical aid at no cost to the Indians – commencing with Spragge's 1873 directive to Provencher and lasting until the commencement of deductions in 1909 – nevertheless constituted an *enforceable* promise. Counsel contends that, given Canada's systematic suppression of traditional religious and healing practices, the Band came to rely on government-supplied medical services, to the detriment of the Band's own healing methods and its ability to care for the sick when the government later withdrew free medical aid. According to the First Nation, such detrimental reliance – where a promise has been made and the promisee relies on the promise to his detriment – constitutes an exception to the basic premise of contract law that all contracts require consideration.[354] The consequence of this principle, in the First Nation's submission, is that, once Canada undertook by its actions to provide medical services and the Band relied on that promise, it was no longer open to Canada to withdraw the promised services or payment. Rather, Canada was bound to continue providing medical aid at its own expense from 1909 to 1934, and its failure to do so constituted a breach of lawful obligation, entitling the First Nation to compensation.[355]

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[354] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 57–58.

Canada denies that detrimental reliance can be used in the manner suggested by the First Nation, countering that the concept simply operates as an equitable defence to the strict enforcement of an existing contract and does not represent an independent cause of action.[356] In counsel's words, "the test for detrimental reliance is that one party, by his unambiguous words or conduct, assures the other party that the strict contractual relations between them will not be insisted upon and the other party acts upon the assurance to his detriment."[357] That test has not been met on the facts of this case, counsel suggests, because there was no *promise* – no contract existed to provide medical services to the Band, and the government did not promise that it would never exercise its discretion under section 92(d) of the *Indian Act* to make deductions for medical aid. Moreover, according to counsel, there was no *detriment* – the Band continued to receive medical aid to its benefit and "did not act to its detriment as a result of medical aid being provided pursuant to Government policy."[358] The First Nation has mischaracterized the government's policy of providing medical aid as a promise or unilateral contract, while, in counsel's submission, Canada has always retained the discretion to change its policy under the principle of parliamentary sovereignty.[359]

Regardless of whether Canada is correct in its view of detrimental reliance as merely a legal defence and not an independent cause of action, I must conclude that Roseau River has not tendered any evidence that would substantiate its claim on this ground. Counsel for the First Nation refers to Canada's "policy of suppression of Indian religious and healing practices,"[360] but, other than a broad reference to a textbook by Katherine Pettipas entitled *Severing the Ties That Bind: Government*

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[355] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, pp. 58–59.

[356] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 25.

[357] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 28.

[358] Written Submission on Behalf of the Government of Canada, March 10, 1999, pp. 26 and 28.

[359] Written Submission on Behalf of the Government of Canada, March 10, 1999, p. 27.

[360] Written Submission on Behalf of the Roseau River Anishinabe First Nation, February 26, 1999, p. 57.

Repression of Indigenous Religious Ceremonies on the Prairies,[361] he provides no examples of Roseau River's traditional healing practices before this suppression, nor any evidence of how Canada's policies disrupted or operated to the detriment of those practices. The only other information I have been able to find is in statements made by elders of the First Nation during the July 14, 1998, community session. Roland Martin commented:

> What I wanted to add, because of the promises of medical aid, and they didn't come.
>
> And so the portion where we helped ourselves to heal ourselves was dropping off, because of the promises that were given by Treaty. And this was part of his, what he was saying was we helped ourselves to heal ourselves, but when the promises came, we kind of let go a little bit because of the promises.[362]

Ed Hayden, now the First Nation's Chief, added:

> I want to go back to traditional practices. I guess before the European contact I believe that our people had ways of healing and dealing with the sickness that they encountered before European contact.
>
> Some of the things they had were things like sweats – I am just mentioning a few things here, and I want to make comment too that I want to reinforce what some of the speakers were saying. The Sundance, shake tent, and of course you mentioned, the previous speakers mentioned the herbal medicines that they gathered....
>
> When we are talking about the promises to health and the practices done, the churches were neglected in being mentioned in this, participating in suppressing our people from practicing the traditional healing practices. There were a number of churches that participated in calling our practices pagan, witch craft, just to get this stopped. And our practices were outlawed....
>
> I have heard our tribal, our members in the past say that when they tried to practice healing our own tribal members in their own way, at times the police would come into the community just trying to find somebody practicing the sweat lodges and all the healing practices that took place there.[363]

Alfred Smith continued the narrative in these terms:

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[361] Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

[362] ICC Transcript, July 14, 1998, p. 78 (Roland Martin as translated by Charles Nelson).

[363] ICC Transcript, July 14, 1998, pp. 113 and 115 (Ed Hayden).

> Going back to that time when I was young, before going to school, I asked questions, as I said before. And I was told the statement, and you can draw your own conclusions, that the medicine men were outlawed in the late 1800s, beginning of the 20th century. Some went to jail for practising.
>
> At that time when I was told that the whitemen had promised medical care, medicine, and one of the reasons why the medicine men were outlawed, one of the reasons I suppose. But today, at this point in time, that remains a question.
>
> Later on, as I sit here today listening, I come to realize something else is more sinister than that. One of our Councillors has stated a form of genocide, and today I am beginning to believe that's part of that. Led us to die. Maybe for you it would be hard to believe. Take away all the whitemen medicine, and what we are left with?
>
> And at that time, when our medicine men were outlawed but had they still kept practising, when the police arrived, they were arrested, jailed, there are documents on that. I have had the opportunity to see one, where an old man was jailed for 30 days of hard labour for practicing.[364]

While I recognize the close relationship between traditional aboriginal religious and healing practices, I would need specific evidence of the impact of government policies on*this* First Nation to be able to base a decision on principles of detrimental reliance, even assuming that those principles can operate as an independent cause of action. In so saying, I should not be taken to mean that the department, the police, the churches, and even the medical profession did not attempt to suppress traditional healing practices and, in so doing, may have caused the Band to abandon or modify some of those customs. However, as I have said, there is no evidence before the Commission to establish what the practices were or how they may have changed or ceased in light of Canada's policies.

Indeed, a careful review of the entire Pettipas book suggests that government policies may not have had much effect on traditional healing practices in any event, as the following excerpt illustrates:

> With the expansion of federal medical services to reserve communities, the Department subjected another class of people to close scrutiny. Attacks against those referred to as medicine men (shamans and healers) were forthcoming from missionaries and medical professionals who believed that indigenous healers were responsible for the physical, moral, and spiritual deterioration of Indian communities.

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[364] ICC Transcript, July 14, 1998, pp. 138–39 (Alfred Smith).

> A statement that typified this attitude was contained in a report submitted to Ottawa by the nursing field matron at the Cree reserve of Little Pine. The medicine men were accused of being the "laziest" men on the reserve, who used their cunning for their personal gain "by working on the credulity and ignorance of their brethren." The medicine men were also blamed for the reluctance of the relatives of the sick to allow the Department's medical officer to visit them.
>
> Since no federal legislation referred to indigenous medical practitioners, agents had little recourse other than personal influence. *This approach had limited effect for a number of reasons. In the first place, most healing ceremonies were not overtly practiced and thus escaped detection. In the second place, adequate federal medical facilities and medicines were simply not readily available to reserve populations. Like many European immigrant groups who had settled in the prairie region, Indian communities continued to depend on their own resources for dealing with illness.* At this time, the Department could not resort to provincial medical acts since Indian healing activities were not illegal as long as they were practiced within reserve boundaries. In the absence of prohibitive legislation, officials resorted to "informal" methods to discourage healers and their patients. These methods included the withholding of government rations and opportunities for government employment, the denial of more general types of aid, and "vaguer threats of official sanction."[365]

Later, Pettipas concluded that "[t]he lack of effective medical services (until the 1940s in Canada), impoverished living conditions, under-nourishment, and disease (especially the post–World War One influenza epidemic and tuberculosis) undoubtedly contributed to the persistence of those indigenous ceremonies that were believed to have significant healing powers."[366] In other words, Pettipas appears to believe that traditional healing practices, although intended to be suppressed and, in fact, inhibited to some extent, were *not* replaced, to the detriment of First Nations, by government officials and programs; rather, those practices persisted because they were practised privately and because government medical services were not yet sufficiently extensive to supplant them. Alfred Smith's evidence suggests that traditional healing practices never disappeared entirely and that today they are experiencing something of a renewal:

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[365] Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994), 159. Emphasis added.

[366] Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994), 229.

> But today it is coming back, medicine men are growing in number, practising medicine, healing through the Sundance, shake tent, sweats. And I have become a part of that scene, it is a gift, spiritual gift.
>
> And yet somehow our people still lack medical help. I have seen within the last few years people being healed through our way, through our custom, our medicine men. Why doesn't the government live up to that obligation they made years ago? That is one question I guess that remains here today. Only you, I guess will be able to answer that question for us, for the government. Whether it's in the positive side or the negative side remains to be seen, but we will continue to practice what has been given to us by the spirits and mother nature herself.[367]

Similarly, through translator Ed Hayden, elder Rosie Nelson spoke of traditional healing practices being performed as late as 1937:

> She [Rosie Nelson] said in 1937 she left school and married Edward, and they had a child, a boy, and he took sick. And the child used to have convulsions. So she went to Letellier to try to find help or whatever. In town, or where she was, the little child was having convulsions in front of the people at the store. And she was told there was a doctor in town so she took him over there.
>
> And she was informed that the child would only live two months because she didn't have any money to get him whatever he needed to, she had to pay for his medicine or whatever care that he needed.
>
> When she brought the child back from the [sic] Letellier, she took him to the traditional healers who were living in the north end of the reserve, and she told them what the doctor was telling her in town about her boy living just for the two months. And apparently the elder and the healer, traditional healer got mad and said the doctor is trying to play God, and said we will take care of him, we will give him some medicine.
>
> What she is saying, there was a promise made by the government that they would provide us the medicines that we needed to take care of us and those things, and that's what he was mad about I guess.[368]

Oliver Nelson confirmed that Rosie Nelson had taken the boy to Okima and Baybameegeesick, who were medicine men, and that "[t]he gentleman that was upset [and] said that was a promise made in the Treaty for health was Assiniwinin, Okima's older brother, [who] I was mentioning earlier this morning ... was the promise keeper.'"[369] The significant aspect of this evidence is that the community's medicine men and healers continued to practise traditional methods in 1937 even *after* Canada's deductions for medical aid from the First Nation's interest account had *ceased* in 1934.

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[367] ICC Transcript, July 14, 1998, pp. 139–40 (Alfred Smith).

[368] ICC Transcript, July 14, 1998, pp. 93–94 (Rosie Nelson as translated by Ed Hayden).

In any event, the analysis proposed by counsel for the First Nation presupposes the existence of a promise of medical aid to be provided by Canada to the Roseau River Band. As I have already stated, although I am reluctant to conclude that such a promise was *not* made, the First Nation has not tendered sufficient evidence to establish that one *was* made. Principles of treaty interpretation require Treaty 1 to be interpreted liberally, with ambiguities or doubtful expressions resolved in favour of the Indians. Even so, I do not believe that a promise of medical aid, if it were found to have existed as of 1871, would have survived the amendment of Treaty 1 in 1875.

Moreover, I have difficulty seeing how it can be said that band members *relied* on a promise of medical aid when the evidence of the elders suggests that band members persisted in consulting their traditional healers, who were still practising in 1937 and apparently continue to do so today. Even if there *was* reliance, the fact that traditional healing practices still endure further implies to the Commission that the *detriment* alleged by the First Nation has not been established.

In these circumstances, I must conclude that, since one or more of the underlying promise, reliance, and detriment have not been established, the First Nation's claim on the basis of detrimental reliance must fail.

That being said, I reiterate my earlier comment that, in light of Canada's delivery and articulation of Indian medical services, perhaps some right to medical aid has grown up prescriptively over time. Although the Commission has not been asked to address the question of medical rights by prescription, and I have refrained from doing so, my comments below regarding the Commission's supplementary mandate deal to some extent with the fairness of charging medical expenses to Roseau River's interest account, given Canada's track record in implementing the policy of requiring bands with financial resources to fund their own medical services.

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[369] ICC Transcript, July 14, 1998, p. 95 (Oliver Nelson).

The Commission's Supplementary Mandate

> **If the Commission concludes that the deductions for medical aid were not contrary to Treaty 1, statute, or the 1903 surrender and did not give rise to detrimental reliance by the Band, were the deductions nevertheless unfair?**

When the original mandate of the Commission was still under discussion, Tom Siddon, at that time the Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations setting out the basis for what the Commission has previously referred to as its "supplementary mandate":

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.[370]

Having concluded that the evidence before it does not establish that the deductions for medical aid from Roseau River's trust accounts from 1909 to 1934 constituted a breach of treaty, the governing legislation, or the 1903 surrender, or that the Band relied to its detriment on a promise of medical aid, I must now consider whether, under the Commission's supplementary mandate, the otherwise correct implementation of the Specific Claims Policy in this case would nevertheless result in unfairness to the First Nation.

During the course of this inquiry, Canada has placed great emphasis on the position that it has employed a consistent policy of requiring those bands with sufficient financial resources to pay their own medical expenses. This policy is perhaps best illustrated by the following excerpt from the report by Frances Foley Smith:

> A clear piece of evidence which reveals that the government expected bands with the capacity to pay their own medical cost[s] is a letter dated November 30, 1888 from the Deputy Superintendent General of Indian Affairs to the Auditor General. He describes a situation whereby two bands were sharing one reserve; one band received free medical aid because "they have very little money at their credit with the government, not sufficient warrant thereof of the salary of a medical man;"

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[370] Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991; reproduced in (1995) 3 ICCP 244.

the other band was required to pay its own medical expenses, since it had "sufficient capital ... to admit of paying from the interest thereof the salary of a medical man." (T.H.R.C. Health Care Correspondence File, 1873–1978). This policy appears to have been applied to all bands, regardless of treaty, including those bands covered by Treaty Six which guaranteed a "medical chest". (See Annual Reports under Battleford, Carlton agencies).

That the government drew upon Indian funds to defray medical costs is not surprising in view of the frequently stated departmental objective of bringing the Indian to a state of self-reliance.

By 1913 in so far as medical aid was concerned an articulated policy had emerged. The following documents express that policy:

1) ... 1913. [Deputy Superintendent General] D.C. Scott's "General Instructions to Indian Agents in Canada". Sections 46 and 47 – Medical Attendance.

> "The Department's policy ... of developing self-dependence in the Indian, is to be borne in mind when medical attendance becomes necessary; no gratuitous attendance is to be given Indians who are able to pay for a physician's services or for medicines." p. 247

2) ... 1922. Indian Commissioner Graham re: medical payment:

> "When Indians are not in a position to make payment promptly of the Doctor's accounts, which have been authorized by the Indian Agent, the Department should liquidate the accounts, and make collection from the Indians concerned when they are in possession of funds." p. 246

3) ... 1934. House of Commons Debates. The Hon. Mr. Murphy (Indian Dept.):

> "These interest funds are used for the benefit of the Indians.... [T]he Indian should be in a position to stand on his own feet and through his own efforts provide for himself.... [I]n some instances the bands hold funds running up to hundreds of thousands of dollars.... [I]t could hardly be argued that a band with such valuable assets should be kept on relief from parliamentary appropriation." p. 266

4) ... 1934. Annual Report on Indian Health Supervision stating division of payment between Dept. and band funds:

> "The costs of the Indian health service is approximately $7.20 per capita from public funds, to which must be added the outlay from band trust funds, which would bring the total cost to just under $10 per Indian per year." p. 268

5) ... 1956. House of Commons Debates. The Hon. Mr. Martin (Indian Dept.):

> "The policy in this particular has never changed. The policy has always been that those who can pay should pay. That is the only policy." p. 301

6) ... 1957. House of Commons Debates. Referring to a directive from the Department of National Health and Welfare, 31 January 1957:

> "Since the funds at the disposal of the Indian and Northern health services are limited, the Indian people who can pay should pay for their transportation, medical care, hospitalization, drugs, glasses, and dental care. Those who cannot pay the full amount should contribute at least a part of the costs of these services." p. 302

7) ... 1968. House of Commons Debates. Referring to a directive from the Department of National Health and Welfare, 4 March 1968:

> "The basis policy of our department is that there is no statutory federal responsibility for our department to provide funds for personal health care services for Indian people.... [O]ur department will assist only in those instances where the Indian people can demonstrate that they do not have private resources, cannot obtain assistance from their band or [from] a provincial welfare or health agency." p. 309

A second directive of 6 March 1968:

> "We must ask all those Indian people and bands who have a source of income to pay for their own health services.... [I]f an Indian person cannot pay for such services, he should first of all request his band for assistance." p. 312

Note: the above documents show that the policy of charging bands for medical expenses continued long after the debits to the Roseau River accounts ceased in 1934. Moreover, they began earlier. The more affluent bands in Ontario and Quebec had begun paying for medical services at least as early as 1868 (Annual Report 1868, pp. 16–20), while the first medical charges to Manitoba bands dates to 1909 (Annual Report, p. 118).[371]

Smith then attempted to apply the policy as articulated to the particular circumstances of the Roseau River Band:

It is evident that the decision to charge the Roseau River Band for some medical services (i.e. physicians' visits and medicines) in 1909, and to discontinue

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[371] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, pp. 40–42 (ICC Exhibit 2).

> these charges in 1934, did not reflect any change in policy or departure from established practice on the part of the government. The charges appear to relate strictly to the level the band's interest account warranted. For example, the year before the debits began the accounts was [sic] in deficit; the year the debits ended it had shrunk to $1,796.22. Between 1909 and 1934, there were several years when the band was not charged for medical expenses, presumably because its interest account decreased: 1915–16 the balance shrank to $552.10; 1916–17 in deficit by $1,534.17; 1929–30 balance of $231.85. Accordingly, no medical expenses were charged to the band fund in these years.
>
> The only year for which the absence of medical debits cannot be explained was 1920–21, when the balance in the intere[s]t accounts was $2,603.85. There is no explanation as to why this occurred....[372]

With all due respect to Frances Foley Smith and the submissions of counsel for Canada, I am not convinced that these statements illustrate a consistently articulated and applied policy. Indeed, the circumstances of the Roseau River Band amply demonstrate the arbitrary manner in which the policy was implemented. As Smith suggests, the Band had insufficient funds before 1909 to warrant deductions before that time, and there were three other years when, because of low account balances, it might have appeared imprudent to make deductions. Yet there were other years, such as 1922–23, 1923–24, 1924–25, 1926–27, and 1931–32, when the closing balance for the fiscal year was less than $1,000.00 – and indeed 1928–29 when the closing balance was a mere $340.33 – during which Canada nevertheless determined that the Band was sufficiently solvent to be able to afford its own medical expenses. Nowhere in the evidence is there any indication of a threshold, on a per capita basis or otherwise, below which expenditures could not be justified.

On their own, these facts raise real concerns about Canada's administration of its Indian health policy. These concerns become magnified when one considers that deductions were *not* made in other years when there were apparently adequate funds in the interest account to merit deductions for medical aid. When the 1921–22 fiscal year is considered on its own, as Smith appears to have done, it might be dismissed as an anomaly, in the event that the Band experienced a year of relatively minor health issues such that medicines, hospitalization, and physicians' services were not required. However, such an explanation would not appear reasonable in relation to 1934–35 and the following decade. During that period, the Band's account balance never fell below $1,796.22 and, during the last six years, annually exceeded $5,000.00, twice surpassing $6,000.00. Despite these balances being the highest ever achieved by the account for the entire 1902–45 reporting period, no medical expenses were charged to it in these latter years. The parties have not tendered evidence of the Band's interest account balances *after* 1945, although it has been intimated that there have been no further deductions for medical aid from the account right up to the present day. Nevertheless, the evidence for the period preceding 1945 undermines Smith's conclusion that "[t]he charges appear to relate strictly to the level the band's interest account warranted."

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[372] Frances Foley Smith, "Research Report on Roseau River Band Claim," July 29, 1982, p. 43 (ICC Exhibit 2).

Canada cannot explain why the deductions from Roseau River's interest account abruptly ceased after the 1933–34 fiscal year. Although the First Nation speculates that the timing relates to the emergence of the *Dreaver* case, the Smith report intimates, without specific examples, that deductions from other bands continued after 1934. Nevertheless, Canada's inability to explain its change of course with regard to Roseau River makes it impossible for Canada to assert that it has invariably applied a policy of holding bands with the ability to pay tobe responsible for their own medical expenses when it cannot consistently make this assertion with regard to Roseau River alone. From my review of the public accounts, it appears that, while deductions were being made from Roseau River's account, other bands may not have been charged for medical expenses when they apparently could afford to do so. It is also difficult to state without reservation that deductions were made from other bands' interest accounts, but *not* from Roseau River, *after* 1934, when Roseau River apparently could have afforded to do so. In attempting to undertake this analysis, I have been hampered by the limitations in the government's record-keeping practices, which (a) provide little or no information of this sort in some years, (b) do not disclose whether bands or individual Indians paid medical expenses out of funds on hand (as opposed to band trust funds), and (c) do not provide a breakdown below the agency level – that is, on a band-by-band basis – of medical expenses charged to government appropriations.

For this reason, the Commission is restricted by the scope of the evidence before it from categorically determining whether Roseau River was in fact treated differently from other bands in the application of the policy. For example, wealthier bands may have paid their own medical expenses, notwithstanding a lack of evidence showing such expenses being deducted from their interest accounts, if in fact they had sufficient funds on hand to pay those bills without resort to their trust funds. Alternatively, poorer bands may have had the major portion of their medical expenses paid from government appropriations, notwithstanding that records of their trust accounts may show some minor medical expenses being deducted. The record in this regard is incomplete and may never be sufficient to establish precisely what transpired.

However, as the First Nation has established at least a *prima facie* case for concluding that a policy of making well-to-do bands foot their own medical expenses has not been evenly applied *in the First Nation's case alone*, I believe that the burden should shift to Canada to establish that the policy was consistently applied to the First Nation over the years, and that it was fair as between the First Nation and other bands. As the party charged with keeping the records required to determine whether the policy was evenly applied, in addition to being the party asserting that the policy has been consistently applied since as early as 1888, Canada should be required to furnish the evidence necessary to establish that position. I recognize that providing such evidence may necessitate a far-reaching inquiry into the payment of medical expenses from the interest accounts of virtually every band in Canada, and that such an inquiry may not even yield the information required to settle the issue, but fairness demands that such an inquiry be undertaken. The broad issue of equity is not something that can be resolved by considering the circumstances of just one band. Unless Canada can show the payments made by the various bands within the context of their respective financial means, I see no other basis for justifying deductions being made from the trust funds of one band, but not from those of another.

Absent such an inquiry or some other means by which Canada can overcome the First Nation's *prima facie* case that the Crown has failed to act consistently and fairly in the circumstances, I would recommend, pursuant to the Commission's supplementary mandate, that Canada enter into negotiations with Roseau River to compensate the First Nation for the medical aid deductions made from its interest account from 1909 to 1934.

Conclusion

In my view, the evidence in this inquiry does not support the conclusion that medical aid constituted one of the promises made by Canada to the Roseau River Anishinabe First Nation and the other bands that signed Treaty 1 in 1871. The best that can be said about medical aid is that it was in doubt from 1871 until the date on which the treaty was amended in 1875. At that time, the terms of the treaty were clarified by the incorporation of the memorandum of outside promises, which did not include medical aid. Even if a promise of medical aid *was* made in 1871, it did not, in my opinion, survive the 1875 amendment, which, in clear and unambiguous terms, terminated all outside promises other than those specifically enumerated in the amendment.

The deductions from Roseau River's interest trust account from 1909 to 1934 were authorized by section 92(d) of the 1906 *Indian Act* and section 95(d) of the 1927 statute. Moreover, they were not precluded by the broad terms of the 1903 surrender of a portion of the First Nation's IR 2, and the evidence of verbal promises at the time of the surrender does not convince me that those terms were narrowed in any material way. Finally, in my view the First Nation has not tendered sufficient evidence to support its claim based on detrimental reliance, assuming that such a claim can be pursued as an independent cause of action.

However, the evidence *does* raise significant concerns about whether Roseau River has been treated fairly within the framework of a policy in which Canada claims to have consistently required those bands with sufficient financial resources to pay for some or all of their medical expenses. Unless Canada can establish that its policy has in fact been consistently applied and that Roseau River has been treated fairly in relation to other First Nations, it is my opinion that Canada should accept this claim for negotiation.

PART V

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The members of the present panel of the Indian Claims Commission differ fundamentally on the terms and implications of Treaty 1. Commissioner Bellegarde considers Treaty 1 to have created a treaty obligation to provide medical aid, with the result that Canada's deductions from Roseau River's interest account between 1909 and 1934 must be viewed as improper and as the basis for an outstanding lawful obligation on Canada's part. Accordingly, it was unnecessary for Commissioner Bellegarde to consider the alternative bases of liability argued by the First Nation – breach of the *Indian Act*, breach of the terms of the 1903 surrender, and detrimental reliance.

By way of contrast, Commissioner Corcoran concludes that Treaty 1 did not include a written or verbal promise of medical aid, but that, even if it did, that promise did not survive the amendment of the treaty in 1875. By virtue of this conclusion, it became necessary for Commissioner Corcoran to assess whether the deductions from the First Nation's interest account from 1909 to 1934 triggered an outstanding lawful obligation under the *Indian Act* or the 1903 surrender, or precipitated a claim based on detrimental reliance. Although she did not find for the First Nation on any of these alternative grounds, Commissioner Corcoran concludes, nonetheless, that the claim should be accepted for negotiation on the basis that, while Canada's policy may have been correctly implemented, the outcome for the Roseau River Anishinabe First Nation is unfair. In this respect, Commissioner Bellegarde concurs with Commissioner Corcoran.

As stated at the outset of our analysis, the Commissioners also agree that the implications of this inquiry extend far beyond the circumstances of the Roseau River Anishinabe First Nation and the territorial limits of Treaty 1. As a panel, we believe that the subject of medical aid is worthy of a comprehensive review by both Canada and the First Nations to give additional definition to the parties' intentions in the negotiation of the various treaties and in their subsequent dealings.

RECOMMENDATIONS

Although the Commissioners disagree on whether Canada owes an outstanding lawful obligation to the Roseau River Anishinabe First Nation based on the facts of this case, we each make three recommendations. Our respective first recommendations are different, but are nevertheless very similar in effect. Our second and third recommendations are joint recommendations.

RECOMMENDATION 1

Commissioner Bellegarde's first recommendation is:

> **That, because Canada breached its lawful obligation to provide medical aid under Treaty 1 by making the deductions from the interest trust account of the Roseau River Anishinabe First Nation from 1909 to 1934, it should immediately commence negotiations with Roseau River to reimburse the First Nation for those deductions, together with interest.**

Commissioner Corcoran's first recommendation is:

> **That, unless Canada can establish that the deductions from the interest trust account of the Roseau River Anishinabe First Nation from 1909 to 1934 were made in a manner that was fair and consistent with its treatment of other First Nations, it should immediately commence negotiations with Roseau River to reimburse the First Nation for those deductions, together with interest.**

Commissioners Bellegarde and Corcoran jointly recommend:

RECOMMENDATION 2

> **That, in the event that the parties are unable to resolve this issue through negotiation, they should be able to return to the Commission, on the motion of either party, to inquire into the compensation payable to the First Nation.**

RECOMMENDATION 3

> **That Canada, in tandem with representative First Nation organizations, should undertake a comprehensive review of medical aid to Indians, with a view to establishing a fair and consistent approach to dealing with this issue, both historically and prospectively.**

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde

Carole T. Corcoran
Commissioner and Panel Chair

Daniel J. Bellegarde
Commission Co-Chair

Dated this 14th day of February, 2001.

APPENDIX A

ROSEAU RIVER ANISHINABE FIRST NATION INQUIRY
MEDICAL AID CLAIM

1	Planning conferences	Ottawa, November 27, 1997 Conference call, February 18, 1998 Conference call, March 20, 1998 Conference call, July 6, 1998 Conference call, December 18, 1998
2	Staff visit	June 11, 1998
3	Community session	July 14, 1998

The Commission conducted a community session at the First Nation's Ginew School on July 14, 1998. During the course of that session, the Commission received evidence and information from Felix Antoine, at that time Chief of the Roseau River Anishinabe First Nation, and from current Chief Ed Hayden and elders Oliver Nelson, Roland Martin, Charles Nelson, Marjorie Nelson, Rosie Nelson, Terrence Nelson, Leonard Nelson, Elizabeth Hayden, Alfred Smith, and Richard Hayden.

4	Legal argument	Winnipeg, March 25, 1999
5	Content of formal record	

The formal record for this inquiry consists of the following materials:

- the documentary record (1 volume of documents with annotated index)
- 12 exhibits tendered during the inquiry
- transcript of community session (1 volume)
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and the Roseau River Anishinabe First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

Interest Trust Account
Showing Revenues and Expenditures (1902–45), by Fiscal Year[1]

FISCAL YEAR	OPENING BALANCE	REVENUE		EXPENDITURE				
		Interest	Other	Interest	Medical Assistance			Other
					Medicines	Physicians	Hospitalization	
1902–03	$ 80.20	$ 35.47	$ 17.50	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 11.00
1903–04	$ 122.17	$ 261.54	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 50.00
1904–05	$ 333.71	$ 30.62	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 210.60
1905–06	$ 153.73	$ 875.23[2]	$ 0.00	$2,571.20[3]	$ 0.00	$ 0.00	$ 0.00	$ 244.79[4]
1906–07	($1,787.03)	$ 21.23	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 278.65
1907–08	($2,044.45)	$1,596.49[5]	$ 0.00	$2,000.00	$ 0.00	$ 0.00	$ 0.00	$ 35.99
1908–09	($2,483.95)	$1,493.65	$ 0.00	$2,081.60[6]	$ 0.00	$ 0.00	$ 0.00	$ 137.36
1909–10	($3,209.26)	$5,004.96	$ 0.00	$ 0.00	$ 0.00	$ 165.00	$ 0.00	$ 0.00
1910–11	$1,630.70	$5,835.83	$ 175.00	$4,566.30[7]	$ 79.70	$ 120.00	$ 0.00	$ 10.50
1911–12	$2,865.03	$5,494.32	$ 267.65	$2,500.00	$ 34.50	$ 130.00	$ 0.00	$ 337.17
1912–13	$5,625.33	$5,096.14	$ 418.12	$5,295.00[8]	$ 134.65[9]	$ 345.00	$ 0.00	$ 618.75
1913–14	$4,746.19	$3,673.72	$ 836.13	$2,589.14	$ 33.90[10]	$ 309.50	$ 0.00	$ 906.60
1914–15	$5,416.90	$2,370.93	$ 518.50	$5,100.00	$ 53.85	$ 100.00	$ 0.00	$1,871.00
1915–16	$1,181.48	$2,851.72	$1,060.65	$3,907.00	$ 0.00	$ 0.00	$ 0.00	$ 664.75
1916–17	$ 522.10	$2,441.48	$ 829.00	$2,874.00	$ 0.00	$ 0.00	$ 0.00	$2,452.75
1917–18	($1,534.17)	$8,902.18	$2,625.75	$4,112.72	$ 103.70[11]	$ 258.25	$ 0.00	$1,792.15
1918–19	$3,726.94	$5,048.40	$2,298.87	$5,136.00	$ 370.86[12]	$ 454.25	$ 0.00	$1,623.50
1919–20	$3,489.60	$6,566.66	$2,723.80	$5,850.00	$ 50.11	$ 23.00	$ 0.00	$3,516.92

1920–21	$3,340.03	$5,472.91	$1,398.10	$2,915.00	$ 0.00	$ 0.00	$ 0.00	$4,602.19
1921–22	$2,693.85	$4,219.41	$2,212.25	$3,960.00	$ 18.60[13]	$ 0.00	$ 14.75	$4,020.11
1922–23	$1,112.05	$4,090.32	$2,728.12	$5,610.00	$ 0.00	$ 87.00	$ 133.90	$1,454.27
1923–24	$ 645.32	$4,091.98	$ 379.25	$3,035.00	$ 40.55	$ 32.00[14]	$ 131.00	$ 964.78
1924–25	$ 913.22	$3,959.27	$1,468.15	$4,417.00	$ 183.50	$ 0.00	$ 0.00	$1,103.60
1925–26	$ 636.54	$3,848.32	$1,494.60	$3,047.00	$ 0.00	$ 126.00	$ 92.50	$1,428.83
1926–27	$1,285.13	$4,092.51	$ 389.00	$3,030.00	$ 20.60	$ 287.36	$ 0.00	$1,825.68
1927–28	$ 603.00	$4,885.39	$ 424.03	$3,332.00	$ 0.00	$ 0.00	$ 3.00	$1,552.38
1928–29	$1,025.04	$3,784.78	$ 781.15	$3,120.00	$ 14.05	$ 16.00[15]	$ 51.55[16]	$2,049.04
1929–30	$ 340.33	$3,724.29	$ 858.78	$3,150.00	$ 0.00	$ 0.00	$ 0.00	$1,541.55
1930–31	$ 231.85	$3,720.74	$1,028.55	$3,135.00	$ 5.50	$ 11.00	$ 0.00[17]	$1,290.29
1931–32	$ 539.35	$3,736.11	$ 601.50	$3,135.00	$ 0.00	$ 1.00	$ 4.00[18]	$ 274.40
1932–33	$1,462.56	$3,782.27	$ 0.00	$3,210.00	$ 2.25	$ 2.00	$ 0.00	$ 951.30
1933–34	$1,079.28	$3,713.21	$ 692.18	$3,025.00	$ 3.00	$ 0.00	$ 0.00	$ 660.45
1934–35	$1,796.22	$3,936.05[19]	$ 802.65	$3,200.00	$ 0.00	$ 0.00	$ 0.00	$1,344.52
1935–36	$1,990.40	$4,828.56	$ 65.00	$3,100.00	$ 0.00	$ 0.00	$ 0.00	$ 84.28
1936–37	$3,699.68	$3,827.18	$ 0.00	$4,514.00	$ 0.00	$ 0.00	$ 0.00	$ 40.00
1937–38	$2,972.86	$3,891.93	$ 5.00	$2,495.00	$ 0.00	$ 0.00	$ 0.00	$ 10.00
1938–39	$4,364.79	$4,682.49	$ 0.00	$3,845.00	$ 0.00	$ 0.00	$ 0.00	$ 62.75
1939–40	$5,139.53	$4,085.09	$ 20.82	$3,930.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
1940–41	$5,315.44	$4,593.18	$ 0.00	$3,975.00	$ 0.00	$ 0.00	$ 0.00	$ 51.00
1941–42	$5,882.62	$5,044.02	$ 33.43	$4,095.00	$ 0.00	$ 0.00	$ 0.00	$ 450.71
1942–43	$6,414.36	$4,211.90	$ 5.24	$4,035.00	$ 0.00	$ 0.00	$ 0.00	$ 385.90
1943–44	$6,210.60	$4,154.87	$ 0.00	$4,050.00	$ 0.00	$ 0.00	$ 0.00	$ 380.49
1944–45	$5,934.98	$4,179.50	$ 0.00	$3,614.00	$ 0.00	$ 0.00	$ 0.00	$ 490.53

TOTALS	$6,009.95	$162,156.85	$27,158.77	$137,556.96	$1,149.32	$2,467.36	$ 430.70	$41,781.53

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[1] The information in this table is derived from two sources: Roger Townshend, "Roseau River Indian Band Claim for Compensation Arising from Management of Band Funds, Specifically, Band Funds Used to Pay for Medical Care, 1909–1934," September 1981 (hereafter "Townshend submission") (ICC Exhibit 1), and Public History Inc., "Roseau River First Nation Medical Aid Claim, 1902–1945: Historical Report," May 12, 1998 (hereafter "PHI report") (ICC Exhibit 4). The Commission has carefully reviewed the historical documents included with the PHI report and used them as the basis for the figures set forth in this table. Unless otherwise noted, and in the absence of evidence directing us to do differently, the Commission has included *all* land-related interest revenues and expenditures – possibly including items other than interest generated by the sale of surrendered reserve lands or distributions of such interest accruals – in the applicable "Interest" columns.

[2] It appears that $690.00 of this amount represents a transfer of interest proceeds from the Band's capital account.

[3] Of this sum, $2,000.00 appears to have been distributed to band members in accordance with Frank Oliver's memorandum of February 21, 1906, and the remaining $571.20 to have been transferred to the Band's capital account in payment of interest on a loan.

[4] The sum of $14.01 has not been accounted for in the ledger and has been arbitrarily assigned by the Commission to "other" expenses.

[5] Of this sum, $1,129.45 represents a transfer of interest proceeds from the Band's capital account.

[6] Of this sum, $2,000.00 appears to have been distributed to Band members in accordance with Frank Oliver's memorandum of February 21, 1906, and the remaining $81.60 to have been transferred to the Band's capital account in payment of interest on a loan.

[7] Both this figure of $4,566.30 and the interest revenue of $5,835.83 appear to have been inflated by $2,500.00 as the result of a cheque in that amount being issued for "interest distribution" and then credited back to the account.

[8] This sum of $5,295.00 includes a $294.81 payment to R. Logan to reflect an "overpay[men]t on land," but it is not clear whether the overpayment refers to principal or interest.

[9] This figure appears as $135.65 in the Townshend submission, pp. 9 and 22. However, the source documentation in the PHI report (pp. 18 and 109) suggests that $134.65 is the correct figure.

[10] The PHI report uses a figure of $75.85 for "drugs" and "medicines," but has apparently overlooked a refund of $41.95 for "drugs" (pp. 18 and 113). For the purposes of providing an accurate portrayal of actual medical expenses, the $41.95 has been treated as an "other" expense.

[11] This figure appears as $138.25 in the Townshend submission (pp. 9 and 26), but the historical documents in the PHI report disclose only one expenditure of $103.70 for "drugs" (p. 123).

[12] There is a difference of $.03 in the totals reported in the Townshend submission ($825.11, pp. 9 and 27) and the PHI report ($825.14, pp. 18 and 125). From our review of the historical documents, it appears that the Townshend submission is correct.

[13] The Townshend submission makes no reference to this amount, but it appears in the PHI report's historical documentation with the notation "relief & drugs" (p. 133). As we have no way of attributing the $18.60 between "relief" and "drugs," we have adopted the approach used in the PHI report of reporting the entire amount under "medicines."

[14] This figure appears as $33.29 in the Townshend submission (pp. 9 and 32), but this amount clearly includes a charge of $1.29 paid to the Canadian Pacific Railway for transportation charges. We have thus relied on the figure in the PHI report (pp. 18 and 139).

[15] Based on the historical documents in the PHI report, this figure includes $6.00 for "glasses to Ind[ian]," but does not include $50.00 paid to Napoleon Hayden in four instalments for "care of Ind[ian]" or two additional payments of $10.00 apiece to Hayden for "care of Wellington" (pp. 18 and 153–55). Similar expenses appear in other years. These may represent additional payments for medical care, but, as neither the Townshend submission nor the PHI report has treated them as such, we have likewise excluded them.

[16] The Townshend submission reports this figure as $50.55 (pp. 9 and 37), which appears to exclude $1.00 charged to "ambulance service" in the PHI report (pp. 18 and 153–54). We have relied on the PHI figure.

[17] The Townshend report identifies an expense of $53.30 for "hospitalization" in 1930–31 (pp. 9 and 38), but there is no evidence of this transaction in the PHI report's historical documents (pp. 18 and 158).

[18] This charge of $4.00 (not included in the Townshend submission) bears the notation "ambulance services" paid to Kerr's Funeral Chapel in the PHI report's historical documents (pp. 18 and 160), so there is some question whether it should be properly characterized as a medical service or a funeral expense. Nevertheless, like Public History Inc., we have interpreted this figure in favour of the First Nation.

[19] A bookkeeping error increased both interest revenues and expenditures by $3,200.00. We have removed these duplicate figures from the table to provide a more realistic representation of the revenues and expenditures for this year.